TEXAS REGISTER

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Cristina Medrano

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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RULE REVIEW

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IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0910-GA

Requestor:

Mr. David A. Reisman, Executive Director

Texas Ethics Commission

Post Office Box 12070

Austin, Texas 78711-2070

Re: Information that must be furnished to a respondent against whom a complaint is filed with the Texas Ethics Commission (RQ-0910-GA)

Briefs requested by September 27, 2010

RQ-0911-GA

Requestor:

The Honorable Allan Ritter

Chair, Committee on Natural Resources

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768

Re: Whether a part-time municipal court judge may simultaneously serve as a member of the board of commissioners of the Jefferson County Drainage District No. 7 (RQ-911-GA)

Briefs requested by September 27, 2010

RQ-0912-GA

Requestor:

The Honorable Royce West

Chair, Committee on Intergovernmental Relations

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Authority of a civil service commission to charge a fee for a promotional examination (RQ-0912-GA)

Briefs requested by September 29, 2010

RQ-0913-GA

Requestor:

The Honorable Yvonne Davis

Chair, Committee on Urban Affairs

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768

Re: Authority of a municipality to contract with a water control and improvement district for the daily operation and management of the municipality (RQ-0913-GA)

Briefs requested by September 29, 2010

RQ-0914-GA

Requestor:

The Honorable Vicki Truitt

Chair, Committee on Pensions, Investments and Financial Services

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether section 542.2035, Transportation Code, prohibits a municipal peace officer from using a handheld laser speed enforcement device to collect evidence before initiating a traffic stop (RQ-0914-GA)

Briefs requested by September 30, 2010

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-201005155
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 1, 2010

♦ ♦ ♦

Opinions

Opinion No. GA-0792

The Honorable Troy Fraser

Chair, Committee on Natural Resources

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Status of particular tracts of land annexed into one groundwater conservation district and subsequently included in special legislation creating a different district (RQ-0817-GA)

S U M M A R Y

Two different political subdivisions may not exercise jurisdiction over the same territory at the same time and *for the same purpose.* For purposes of *statutory* law, the 1995 special law creating the Hemphill County Underground Water Conservation District prevails over the prior annexation of territory by the Panhandle Groundwater Conservation District pursuant to general law. A disputed tract of land claimed both by the Jeff Davis County Underground Water Conservation District and the Presidio County Underground Water Conservation District is exclusively within the territory of the Presidio District. A disputed tract of land claimed both by the Jeff Davis County Underground Water Conservation District and the Middle Pecos Groundwater Conservation District is exclusively within the territory of the Middle Pecos District. A disputed tract of land claimed both by the Jeff Davis County Underground Water Conservation District and the Brewster County Groundwater Conservation District is exclusively within the territory of the Brewster District. In any of the above referenced scenarios, there may exist *constitutional* considerations that would require a different result.

Opinion No. GA-0793

The Honorable Garnet F. Coleman

Chair, Committee on County Affairs

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a school district may access and use a county's right-of-way to install fiber optic cable (RQ-0818-GA)

S U M M A R Y

Because no statute grants school districts the right to access and use county road rights-of-way to install fiber-optic cable, a school district is not entitled to use county road rights-of-way for that purpose.

Opinion No. GA-0794

Mr. Robert Scott

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Whether section 11.1513 of the Education Code prohibits a school superintendent to whom final selection of personnel is delegated from employing persons related to trustees of his district (RQ-0842-GA)

S U M M A R Y

Pursuant to subsection 11.1513(f) of the Education Code, the Legislature has generally prohibited a school district, either through its board of trustees or its superintendent to whom final selection of personnel is delegated, from employing persons related to members of the school district's board of trustees within the degrees described in chapter 573 of the Government Code.

Pursuant to Education Code subsection 11.1513(g), a superintendent who has been delegated final authority for personnel selection may employ a relative of a member of the school district board of trustees if the superintendent's school district is located: (1) wholly in a county with a population of less than 35,000; or (2) in more than one county, if the county in which the largest portion of the district is located has a population of less than 35,000.

Under chapter 573 of the Government Code, criminal penalties may be imposed on a public official who appoints, confirms the appointment of, or votes for the appointment or confirmation of the appointment of an individual if the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by section 573.002. Section 11.1513(f) of the Education Code is not clear as to whether the criminal penalties would apply to a superintendent with final hiring authority or to board members that delegated that final authority. Due to the long-settled rule of law that a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, we refrain from concluding that the superintendent or the board members could be subject to these penalties. If the Legislature intends otherwise, it may expressly amend the statute to so provide.

Opinion No. GA-0795

The Honorable Patrick M. Rose

Chair, Committee on Human Services

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Jurisdiction over land that is annexed by two separate special districts (RQ-0812-GA)

S U M M A R Y

Whether a water district--that adds territory pursuant to individual petitions of separate landowners, in compliance with Water Code sections 36.321 through 36.324,*before* annexation of the same territory by another groundwater district is ratified at an election under section 36.328--acquires jurisdiction over the subject territory depends on whether a court would apply the first-in-time rule to competing chapter 36 annexation claims. Applying the first-in-time rule, a court could find that the first district to *initiate* annexation procedures acquires jurisdiction. A court could also find that the first district to *finalize* the annexation acquires jurisdiction. This office cannot predict, in the apparent absence of judicial precedent, how a Texas court would resolve this issue. As a result, we cannot definitively answer your question.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201005142
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 31, 2010

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8052

The Texas Health and Human Services Commission (HHSC) proposes an amendment to Title 1, Part 15, Subchapter J, Division 4, §355.8052, concerning Inpatient Hospital Reimbursement. The amendment updates the Medicaid inpatient hospital reimbursement methodology.

Background and Justification

The proposed rule complies with the 2010-11 General Appropriations Act (Article II, HHSC, Rider 68, S.B. 1, 81st Legislature, Regular Session, 2009), which requires HHSC to rebase acute care hospital rates within available funds (at no additional cost). Specifically, the legislation requires HHSC to update the payment division standard dollar amounts (PDSDAs) and diagnosis related group (DRG) factors with more recent cost data. Rider 68 further instructs HHSC to proportionately reduce the rebased PDSDA rates to remain within available funds. The current rules were amended and adopted on August 9, 2010 to include these legislative provisions.

The PDSDA is a component of the Medicaid inpatient reimbursement formula for hospitals. The PDSDA is the weighted average dollar amount per claim calculated for all hospitals in a payment division, which is a grouping of hospital-specific standard dollar amounts (HSDAs). The HSDA is based on each hospital's average cost per claim for a designated base year, adjusted by the hospital's case mix index and a cost-of-living index.

HHSC was scheduled to implement the rebased PDSDA rates for services provided effective September 1, 2010, however the rebased rates would have resulted in some hospitals' SDA payments decreasing and some hospitals' SDA payments increasing, thus having positive and negative fiscal impacts. HHSC received feedback that hospitals were concerned about the substantial financial impact to their hospital as well as other hospitals in their geographic region if the proportional rebasing were implemented. HHSC is concerned that the implementation of the proportional rebased SDAs would have unintended negative consequences to the future provision of inpatient services in the state. As a result, an amendment to this rule is being proposed which will develop new SDAs that would mitigate the loss of revenues to impacted hospitals to 10 percent of their estimated loss. In order to achieve the no-cost provision of Rider 68, the rule also outlines an adjustment of the proportional rebased SDAs to limit the amount of revenue gained by positively impacted hospitals.

The proposed rule changes described above will not result in a fiscal impact to the state. However, individual hospitals will still experience changes in their reimbursement as their rates are adjusted to more closely align with their recent cost experience.

Section-by-Section Summary

Proposed §355.8052(c)(15) creates a new definition for final standard dollar amount (SDA) to clarify that this amount is after adjustments to the PDSDA.

Proposed §355.8052(d)(2) adds language to specify that the PDSDA can be adjusted using methods described in subsection (d)(12). Subsection (d)(2)(B)(iii) adds language to specify that a final SDA is assigned to each hospital that is adjusted under subsection (d)(12).

Proposed §355.8052(d)(7)(A) is amended to indicate that adjustments to the PDSDA are in accordance with subsection (d)(12) and that a final SDA is assigned to hospitals that are adjusted.

In proposed §355.8052(d)(9)(B) and (C), amendments are made to describe the methodology used in merged hospital calculations where at least one of the hospitals has a pre-merger final SDA.

Proposed §355.8052(d)(12) creates a new paragraph for describing the adjustments made to PDSDAs. Subsection (d)(12)(A) references §355.201 (relating to Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission), which describes circumstances under which rates may be adjusted, and sets out the methods HHSC may use to make those adjustments.

Proposed §355.8052(d)(12)(B) describes the changes HHSC will make to result in a final SDA that will apply to claims for dates of admission on or after November 1, 2010. Subsection (d)(12)(B)(i) describes how total revenue is calculated using information from federal fiscal year 2008. Subsection (d)(12)(B)(ii) describes how total revenue is calculated using adjusted PDSDAs. Subsection (d)(12)(B)(iii) describes that the difference in the total revenues from subsection (d)(12)(B)(i) and (ii) are determined. Subsection (d)(12)(B)(iv) describes that the result of subsection (d)(12)(B)(iii) is limited to 10 percent of the result from that clause if it is negative. Subsection (d)(12)(B)(v) describes that the result of subsection (d)(12)(B)(iii) will be limited to the difference required to stay within available funding if the result in subsection (d)(12)(B)(iii) is positive. Subsection (d)(12)(B)(vi) indicates that a final SDA cannot result in a reim-

bursement that is greater than the cost of providing Medicaid services. Subsection (d)(12)(B)(vii) indicates that the hospitals described in subsection (d)(8), including military hospitals, out-of-state hospitals, newly enrolled hospitals, and new hospitals, will not have their PDSDA adjusted under subparagraph (B) of subsection (d)(2).

Proposed §355.8052(d)(12)(C) indicates that no hospital's PDSDA can be below the minimum PDSDA described in paragraph (6)(D).

Proposed §355.8052(g)(1), (2), (2)(A)(iii) and (5)(B)(i) are amended to indicate that when calculating payment amounts, the PDSDA or final SDA (if adjustments are made) is used.

Other provisions are renumbered throughout the proposed rule.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed rule is in effect there will be no fiscal impact to state government as a result of rebasing the PDSDA amounts and diagnosis related groups (DRG) factors with more recent cost data and to proportionately reduce these PDSDA used to reimburse acute care hospitals within available funds (no cost).

HHSC anticipates that the net fiscal impact of the amendment to all Medicaid hospitals will be zero. While the changes to the inpatient reimbursement methodology may increase or decrease Medicaid revenue to individual hospitals, including hospital districts, local governments will not incur additional costs as a result of the amendment. The proposed rule will not result in any fiscal implications for local health and human services agencies.

Small and Micro-business Impact Analysis

HHSC was scheduled to implement the PDSDA rebased rates for services provided effective September 1, 2010, however the rebased rates would have resulted in an estimated 135 hospitals whose SDA payments will decrease and an estimated 263 hospitals whose SDA payments will increase, thus having positive and negative fiscal impacts. This rule change is being proposed as a transitional adjustment to the current rule to more closely align hospitals with their recent cost experience while still allowing adversely impacted hospitals time to adapt to rebasing without a sudden substantial financial impact.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from adoption of the amendment. The anticipated public benefit, as a result of enforcing the amendment, HHSC will rebase inpatient hospital rates to maintain within current expenditures in an effort to pay inpatient reimbursement rates that more closely approximate all hospitals' costs. In addition, the rule proposal allows for the mitigation of the loss of revenues to impacted hospitals as a transition to a full proportionate adjustment to hospital rates.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Chris Dockal, Senior Rate Analyst in the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax (512) 491-1983; or by e-mail at Chris.Dockal@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed rule amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8052. Inpatient Hospital Reimbursement.

(a) Application and general reimbursement method.

(1) The prospective payment system described in this section applies to inpatient hospital payments.

(2) HHSC calculates reimbursement for a covered inpatient hospital service, determined in subsection (g) of this section, by multiplying the hospital's payment division standard dollar amount or final standard dollar amount, determined in subsection (d) of this section, by the relative weight for the appropriate diagnosis-related group, determined in subsection (e) of this section.

(3) HHSC will send a hospital an initial notification letter describing the hospital-specific and payment division standard dollar amounts resulting from the rebasing process referenced in subsection (d)(1) of this section. HHSC will send a hospital a final notification letter reporting the hospital's payment division standard dollar amount or final standard dollar amount for a given fiscal year or any portion thereof designated by HHSC, which may include any adjustment described in subsection (d) of this section.

(4) HHSC will rebase hospital-specific and payment division standard dollar amounts when funds are appropriated for that purpose or at its discretion.

(5) HHSC will rebase hospital-specific and payment division standard dollar amounts during the state fiscal year that is three years after the last rebasing year.

(b) Exceptions. The prospective payment system described in this section does not apply to the following types of hospitals for covered inpatient hospital services:

(1) In-state and out-of-state children's hospitals. In-state and out-of-state children's hospitals are reimbursed using the methodology described in §355.8054 of this chapter (relating to Children's Hospital Reimbursement Methodology).

(2) State-owned teaching hospitals. A state-owned teaching hospital is reimbursed in accordance with the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) principles using the methodology described in §355.8056 of this chapter (relating to State-Owned Teaching Hospital Reimbursement Methodology).

(3) Freestanding psychiatric hospitals. A freestanding psychiatric hospital is reimbursed under the methodology described in §355.8060 of this chapter (relating to Reimbursement Methodology for Freestanding Psychiatric Facilities).

(c) Definitions. When used in this section, and §355.8054 and §355.8056 of this chapter, the following words and terms will have the following meanings, unless the context clearly indicates otherwise.

(1) Adjudicated--The approval or denial of an inpatient hospital claim by HHSC.

(2) Average base year cost per claim--One factor used in arriving at the hospital-specific standard dollar amount; the arithmetic mean of base year costs per claim for a hospital, obtained by dividing the sum of all base year costs per claim for that hospital by the number of base year claims in the set.

(3) Base year--A period of 12 consecutive months selected by HHSC.

(4) Base year claims--All Medicaid traditional fee-for-service (FFS) and Primary Care Case Management (PCCM) inpatient hospital claims for reimbursement filed by a hospital that:

(A) Have a date of admission occurring within the base year;

(B) Are adjudicated and approved for payment during the base year and the six-month grace period that immediately follows the base year or another grace period designated by HHSC and communicated in writing to all hospitals, except for such claims that have zero inpatient days;

(C) Are not claims for patients who are covered by Medicare; and

(D) Are not Medicaid spend-down claims.

(5) Base year cost per claim--One factor used in arriving at the hospital-specific standard dollar amount; the cost for a claim that would have been made to a hospital if HHSC reimbursed the hospital under methods and procedures used in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), also called the TEFRA cost for rebasing, described in subsection (d)(10) of this section, without the application of the TEFRA target cap. See also definition of TEFRA cost for rebasing in paragraph (34) [~~(33)~~] of this subsection.

(6) Case mix index--The average relative weight of a hospital's base year claims, obtained by summing the hospital's relative weights for all base year claims divided by the total number of that hospital's base year claims.

(7) Cost-of-Living Index--An adjustment applied to hospital-specific standard dollar amounts based on the Market Basket Index to account for changes in cost of living.

(8) Cost outlier payment adjustment--A payment adjustment for a claim with extraordinarily high costs.

(9) Cost outlier threshold--One factor used in determining the cost outlier payment adjustment.

(10) Data entry error--An error resulting from mis-keyed or mistyped data that is different from the intended entry. This type of error does not include the omission of claims approved for payment after the base year and grace period.

(11) Day outlier threshold--One factor used in determining the day outlier payment adjustment.

(12) Day outlier payment adjustment--A payment adjustment for a claim with an extended length of stay.

(13) Diagnosis-related group (DRG)--The classification of medical diagnoses as defined in the Medicare DRG system or as otherwise specified by HHSC.

(14) Final settlement--Reconciliation of cost in the Medicare/Medicaid hospital fiscal year end cost report performed by HHSC within six months after HHSC receives the cost report audited by a Medicare intermediary, or in the case of children's hospitals, audited by HHSC.

(15) Final Standard Dollar Amount (SDA)--the PDSDA or other rate assigned to a hospital after application of all of the PDSDA adjustments described in this section.

(16) [~~(15)~~] HHSC--The Texas Health and Human Services Commission or its designee.

(17) [~~(16)~~] Hospital-specific standard dollar amount (HSDA)--One factor used in arriving at the payment division standard dollar amount; the average base year cost per claim for a hospital, adjusted by the case mix index and cost-of-living index.

(18) [~~(17)~~] In-state children's hospital--A hospital located within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(19) [~~(18)~~] Interim payment--An initial payment made to a hospital that is later settled to Medicaid-allowable costs, for hospitals reimbursed under methods and procedures in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).

(20) [~~(19)~~] Interim rate--The ratio of Medicaid allowed inpatient costs to Medicaid allowed inpatient charges filed on a hospital's Medicare/Medicaid cost report, expressed as a percentage. The interim rate established during a cost report settlement for a DRG reimbursed hospital reimbursed under this section excludes the application of TEFRA target caps and the resulting incentive and penalty payments for a hospital's fiscal years ending on or after October 1, 2007.

(21) [~~(20)~~] Market Basket Index--The Centers for Medicare and Medicaid Services (CMS) projection of the annual percentage increase in hospital inpatient operating costs, as defined in 42 C.F.R. §413.40.

(22) [~~(21)~~] Mathematical error--An error that results from the erroneous application of variables, quotients, or functions within a methodology formula resulting in a different result than intended methodology results. This type of error does not include the omission of claims approved for payment after the base year and grace period.

(23) [~~(22)~~] Mean length of stay (MLOS)--One factor used in determining the payment amount calculated for each diagnosis related group; for each diagnosis related group, the average number of days that a patient stays in the hospital.

(24) [~~(23)~~] Military hospital--A hospital operated by the armed forces of the United States.

(25) [~~(24)~~] New hospital--A hospital that was newly constructed and enrolled as a Medicaid provider after the end of the base year.

(26) [~~(25)~~] Newly enrolled hospital--A hospital that was assigned a new Texas Provider Identification number (TPI) and was enrolled as a Medicaid provider after the end of the base year.

(27) [~~(26)~~] Out-of-state children's hospital--A hospital located outside of Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(28) [~~(27)~~] Payment division--A group of hospitals whose calculated hospital-specific standard dollar amounts fall within a $100 range, where the $100 increments begin at zero.

(29) [~~(28)~~] Payment division index (PDI)--A list of all payment divisions and their corresponding valid payment division standard dollar amounts.

(30) [~~(29)~~] Payment division standard dollar amount (PDSDA)--The weighted average dollar amount per claim calculated for all hospitals in a payment division, adjusted pursuant to §355.201 of this title (relating to Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission), if necessary.

(31) [~~(30)~~] Rebasing--Calculation of the TEFRA cost for base year claims for each Medicaid inpatient hospital. The TEFRA costs for base year claims will be used to recalculate HSDAs, PDSDAs, and DRG statistics (relative weight, mean length of stay, and day outlier threshold) using the methods described in this section.

(32) [~~(31)~~] Relative weight--The weighting factor HHSC assigns to a diagnosis related group representing the time and resources associated with providing services for that diagnosis related group.

(33) [~~(32)~~] State-owned teaching hospital--The following hospitals: University of Texas Medical Branch (UTMB); University of Texas Health Center Tyler; and M.D. Anderson Hospital.

(34) [~~(33)~~] TEFRA cost for rebasing--One factor used in arriving at the hospital-specific standard dollar amount; Medicaid allowable charges for base year claims adjusted to cost by the interim rate derived from tentative or final settlement of cost reports that cover time periods in the base year, or a prior period, if a base year cost report is not available.

(35) [~~(34)~~] TEFRA target cap--A limit set under the Social Security Act §1886(b) (42 U.S.C. §1395ww(b)) and applied to the cost settlement for a hospital reimbursed under methods and procedures in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). TEFRA target cap is not applied to patients under age 21, and incentive and penalty payments associated with this limit are not applicable to patients under age 21.

(36) [~~(35)~~] Tentative settlement--Reconciliation of cost in the Medicare/Medicaid hospital fiscal year-end cost report performed by HHSC within six months after HHSC receives an acceptable cost report filed by a hospital.

(37) [~~(36)~~] Universal mean--Average base year cost per claim for all hospitals.

(38) [~~(37)~~] Weighted hospital-specific standard dollar amount (HSDA)--One factor used in arriving at the payment division standard dollar amount; the product obtained by multiplying a hospital's hospital-specific standard dollar amount by the number of its base year claims.

(d) Payment Division Standard Dollar Amount (PDSDA) Calculations. HHSC will use the methodologies described in this subsection to determine the PDSDA for a hospital.

(1) Rebasing PDSDAs. HHSC may recalculate a hospital's PDSDA using base year claims. HHSC will not include claims that are adjudicated and approved for payment after the base year and subsequent six-month grace period. The six-month grace period is intended to allow HHSC to include as many base year claims as possible, given practical time constraints.

(2) Adjustment of PDSDAs.

(A) HHSC may adjust a hospital's PDSDA in accordance with §355.201 of this title using one or more of the methods described in paragraph (12) of this subsection.

(B) For a hospital that was inactive for reimbursement purposes during any period in which HHSC made an adjustment:

(i) HHSC will adjust the hospital's PDSDA accordingly; and

(ii) HHSC will assign the hospital to a payment division within the PDI that corresponds to the PDSDA as determined in clause (i) of this subparagraph; or

(iii) HHSC will assign the hospital a final SDA if adjustments are made to the hospital's PDSDA under subsection (d)(12) of this section.

(3) Hospital-specific standard dollar amount (HSDA). Using base year claims, HHSC calculates an HSDA for each hospital as follows:

(A) Determines the base year cost per claim, also called the TEFRA cost for rebasing, in accordance with paragraph (10) of this subsection;

(B) Sums the dollar amount for each hospital's base year costs per claim determined in subparagraph (A) of this paragraph;

(C) Calculates the average base year cost per claim by dividing the result in subparagraph (B) of this paragraph by the total number of base year claims for the hospital;

(D) Calculates the case mix index by summing the hospital's newly calculated relative weights for all base year claims divided by the total number of that hospital's base year claims;

(E) Divides the average base year cost per claim determined in subparagraph (C) of this paragraph by the hospital's case mix index determined in subparagraph (D) of this paragraph; and

(F) Multiplies the result in subparagraph (E) of this paragraph by the cost-of-living index described in paragraph (4) of this subsection to adjust costs from the base year to the rebased-rate year, which results in the HSDA.

(4) Cost-of-Living Index. HHSC updates HSDAs by applying a cost-of-living index to the HSDA established for the base year. HHSC uses the CMS Prospective Payment System Hospital Market Basket Index based on a federal fiscal year adjusted to a state fiscal year.

(5) Payment Divisions. HHSC groups hospital HSDAs into payment divisions by one-hundred-dollar ($100) increments beginning at zero. Each payment division is assigned a number in the PDI. For example, all hospitals with HSDAs between $1,700.00 and $1,799.99 are grouped together in payment division number 18 within the PDI.

(6) Payment Division Standard Dollar Amount (PDSDA).

(A) HHSC computes a PDSDA for all hospitals within a payment division as follows:

(i) multiplies each hospital's HSDA by the hospital's total number of base year claims, resulting in a weighted HSDA;

(ii) sums the weighted HSDAs determined in clause (i) of this subparagraph for all hospitals within a payment division; and

(iii) divides the result in clause (ii) of this subparagraph by the total number of base year claims for all hospitals within a payment division, which results in the PDSDA.

(B) The PDSDA calculation does not include data from the following types of hospitals:

(i) out-of-state hospitals;

(ii) military hospitals;

(iii) new or newly enrolled hospitals;

(iv) in-state and out-of-state children's hospitals;

(v) inpatient psychiatric hospitals; and

(vi) state-owned teaching hospitals.

(C) If a payment division has fewer than 20 total base year claims, HHSC considers that payment division to be invalid. Hospitals within that payment division are assigned a PDSDA equal to the mathematically closest valid PDSDA.

(D) Minimum PDSDA. The minimum PDSDA of $1,600.00 is applied to any hospital with an HSDA equal to or less than $1,600.00.

(7) Payment Division Index (PDI).

(A) After all hospitals have been assigned a payment division number, HHSC will adjust the standard dollar amount for that payment division in accordance with paragraph (12) [~~(2)~~] of this subsection. The resulting PDSDA is the reimbursement rate for all hospitals assigned that payment division number, unless a hospital in that payment division is assigned a final SDA as a result of additional adjustments described in paragraph (12) of this subsection. The PDI is the list of all payment division numbers and the corresponding valid PDSDAs.

(B) If the resulting PDSDA is less than $1,600.00, the minimum PDSDA is applied.

(C) HHSC will assign a payment division designation to the universal mean plus the cost-of-living update used in the most recent rebasing calculation and will apply any adjustments under subparagraph (A) of this paragraph. The resulting amount is the PDSDA for the payment division assigned to hospitals listed in paragraph (8)(A) of this subsection.

(D) HHSC will assign a payment division designation to be used for a new hospital reimbursement rate. HHSC will calculate the rate as described in paragraph (8)(B) of this subsection and will apply any adjustments under subparagraph (A) of this paragraph, which will be the PDSDA for this designation.

(8) PDSDAs for specific types of hospitals.

(A) The following types of hospitals are assigned the PDSDA described in paragraph (7)(C) of this subsection:

(i) military hospitals;

(ii) out-of-state hospitals; and

(iii) newly enrolled hospitals.

(B) New Hospitals.

(i) For a new hospital, HHSC will locate the universal mean in an array of all hospitals' base year costs per claim from lowest to highest. HHSC will then determine the group of claims located three percentile points above the universal mean. The new hospital is assigned the lowest dollar value claim within that percentile group, plus the cost-of-living update calculated at the most recent rebasing, as its PDSDA.

(ii) This rate is effective for five years or until HHSC recalculates PDSDAs, whichever is earlier. After five years from the date HHSC applied the rate determined under clause (i) of this subparagraph, HHSC will assign the hospital the PDSDA described in subparagraph (A) of this paragraph if HHSC has not recalculated PDSDAs.

(iii) A replacement facility constructed for a hospital that is currently enrolled as a Medicaid provider is reimbursed using either the PDSDA or final SDA of the existing provider or the PDSDA for new hospitals, whichever is greater.

(iv) Any PDSDA assigned under this subparagraph is subject to paragraph (7) of this subsection.

(9) Merged hospitals.

(A) Notice. When two or more Medicaid participating hospitals merge to become one participating provider and the participating provider is recognized by Medicare, the participating provider must submit written notification to HHSC's provider enrollment contact, including documents verifying the merger status with Medicare. HHSC will assign to the merged entity a PDSDA, including adjustments, determined using a methodology described in subparagraph (B) of this paragraph for all hospitals involved in the merger.

(B) Determining a merged entity's PDSDA or final SDA. HHSC will use the following process to determine a merged entity's PDSDA or final SDA:

(i) When HHSC recognizes a merged entity after HHSC has completed a rebasing in which each of the merging hospitals had been a participating provider and after which none of the merging hospitals were a replacement facility receiving the new-hospital rate as referenced in paragraph (8)(B)(iii) of this subsection, HHSC will determine the merged entity's PDSDA as follows:

(I) HHSC will calculate a new HSDA for the entity by combining the original base year cost per claim determined in paragraph (3)(A) of this subsection from the rebasing period for all hospitals involved in the merger;

(II) Using the resulting HSDA, HHSC will assign the merged entity to a payment division as described in paragraph (5) of this subsection. HHSC will reimburse the merged entity at the PDSDA corresponding to that payment division number within the PDI described in paragraph (7) of this subsection;

(III) HHSC will apply the resulting PDSDA to the surviving and terminated entities' Texas provider numbers retroactive to the date on which Medicare recognized the merged participating provider; and

(IV) HHSC will notify the merged entity of the PDSDA and the effective and termination dates of the Texas provider numbers for the involved hospitals.

(ii) When HHSC recognizes a merged entity involving at least one hospital having a PDSDA that is not based on the average base year cost per claim for that hospital, HHSC will assign the merged entity's PDSDA using the methodology in clause (iii) of this subparagraph. Hospitals in this category may include:

(I) New hospitals;

(II) Newly enrolled hospitals; and

(III) Hospitals assigned the new-hospital PDSDA based on construction of a replacement facility.

(iii) When HHSC recognizes a merged entity described in clause (ii) of this subparagraph, HHSC will determine the merged entity's PDSDA as follows:

(I) For each merging hospital, multiply the hospital's pre-merger PDSDA by the hospital's total number of claims for the state fiscal year claims file preceding the Medicare effective date of the merger;

(II) Sum the results of subclause (I) of this clause for all merging hospitals;

(III) Divide the result of subclause (II) of this clause by the total number of claims for all merging hospitals;

(IV) HHSC will assign the hospital to the payment division within the PDI that corresponds to the result of the calculation in subclause (III) of this clause;

(V) HHSC will apply the resulting PDSDA to the surviving and terminated entities' Texas provider numbers retroactive to the date on which Medicare recognized the merged participating provider; and

(VI) HHSC will notify the merged entity of the PDSDA and the effective and termination dates of the Texas provider numbers for the involved hospitals.

(iv) When HHSC recognizes a merged entity involving at least one hospital having a final SDA as a result of adjustments made to the entity's PDSDA under paragraph (12) of this subsection, HHSC will determine the merged entity's final SDA as follows:

(I) HHSC will multiply the PDSDA or final SDA of each merging hospital by the case mix from the most recent rebasing file for that hospital;

(II) HHSC will sum the results obtained in subclause (I) of this clause for all merging hospitals;

(III) HHSC will sum the case mix from the most recent rebasing file for all merging hospitals;

(IV) HHSC will divide the result obtained in subclause (II) of this clause by the result obtained in subclause (III) of this clause to determine the final SDA for the merged entity;

(V) HHSC will apply the resulting final SDA to the surviving and terminated entities' Texas provider numbers retroactive to the date on which Medicare recognized the merged participating provider; and

(VI) HHSC will notify the merged entity of the final SDA and the effective and termination dates of the Texas provider numbers for the involved hospitals.

(v) [~~(iv)~~] When HHSC recognizes a merged entity during a rebasing in which each of the merging hospitals had been a participating provider:

(I) HHSC will calculate a new HSDA by combining the amounts determined in paragraph (3)(A) of this subsection for all hospitals involved in the merger;

(II) Using the resulting HSDA, HHSC will assign a PDSDA or final SDA for the merged entity as described for all other hospitals in this subsection;

(III) For any concurrent or retroactive reimbursements prior to the effective date of a rebasing, HHSC will assign the merged entity's PDSDA or final SDA determined using either the methodology described in clause (i), [~~or~~] (iii) or (iv) of this subparagraph.

(C) HHSC will not recalculate the PDSDA or final SDA of a hospital acquired in an acquisition or buyout unless the acquisition or buyout resulted in the purchased or acquired hospital becoming part of another Medicaid participating provider. HHSC will continue to reimburse the acquired hospital based on the PDSDA or final SDA applied before the acquisition or buyout.

(10) TEFRA Cost for Rebasing. HHSC applies the cost reimbursement principles described in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), to calculate the TEFRA cost for rebasing as follows:

(A) HHSC applies an interim rate for rebasing derived from tentative or final cost reports covering the base year. The interim rates for rebasing are applied to claims in months within the base year that coincide with months within the hospital's cost reporting periods.

(i) For cost report periods ending before October 1, 2007, HHSC calculates the interim rate by dividing a hospital's reported costs for providing Medicaid fee-for-service inpatient services by its allowed charges for those services.

(ii) For cost report periods ending on or after October 1, 2007, HHSC calculates the interim rate by:

(I) combining the hospital's reported costs for providing Medicaid fee-for service and Primary Care Case Management (PCCM) inpatient services;

(II) combining the hospital's allowed charges for providing Medicaid fee-for-service and PCCM inpatient services; and

(III) dividing the amount determined in subclause (I) of this clause by the amount determined in subclause (II) of this clause.

(B) The TEFRA cost for rebasing is calculated by multiplying the Medicaid allowed charges for each base year claim by the interim rate described in subparagraph (A) of this paragraph.

(C) HHSC uses the tentative or final cost report settlement that is complete and available on the date HHSC sends the initial PDSDA notification letter to the hospital. The results of a tentative or final cost report settlement completed after the date HHSC sends the initial PDSDA notification letter to the hospital are not considered for purposes of this subsection.

(D) If there is no tentative or final cost report settlement available that coincides with any month of the base year, the TEFRA cost for rebasing is calculated using the latest available cost report period preceding the base year.

(E) If there is no tentative or final cost report settlement available for a provider, the TEFRA cost for rebasing is not calculated for this provider. In this instance the provider will be assigned a PDSDA as described in paragraph (8) of this subsection [~~(d)(8) of this section~~].

(11) Correction of payment division error and reprocessing of claims.

(A) HHSC will place a hospital in the correct payment division if HHSC determines that the hospital was incorrectly assigned to a payment division due to a mathematical error or data entry error by HHSC.

(B) HHSC will reprocess all claims adjudicated during that state fiscal year that were paid to the hospital using the incorrect PDSDA by applying the corrected PDSDA to the claims. No corrections are made for claims adjudicated in previous state fiscal years.

(12) Adjustment of PDSDAs.

(A) HHSC may adjust PDSDAs pursuant to §355.201 of this title using the following methods.

(i) HHSC may reduce the PDSDAs of all hospitals by the same percentage under the circumstances outlined in §355.201 of this title; and

(ii) HHSC may adjust groups or classes of hospitals' PDSDAs under the circumstances outlined in §355.201 of this title.

(B) For claims for dates of admission on or after November 1, 2010, HHSC will assign a final SDA using the following methodology:

(i) Calculate the total revenue earned by each hospital using base year claims, PDSDAs and DRG relative weights in effect in federal fiscal year 2008;

(ii) Calculate the total revenue that would have been earned by each hospital using base year claims for federal fiscal year 2008, PDSDAs adjusted under subparagraph (A)(i) of this paragraph, and DRG relative weights calculated under subsection (e) of this section;

(iii) Calculate the difference between clause (i) and (ii) of this subparagraph for each hospital;

(iv) For each hospital where the result in clause (iii) of this subparagraph is negative, calculate a final SDA that will limit the difference to ten percent of the result in clause (iii) of this subparagraph subject to limitations in clause (vi) of this subparagraph. The limitation to ten percent of the result in clause (iii) of this subparagraph is intended to approximate total revenue from the base year and does not entitle the hospital to additional reimbursement if actual revenue loss in any fiscal year is greater than ten percent;

(v) For each hospital where the result in clause (iii) of this subparagraph is positive, calculate a final SDA that will limit the difference to the percent of the result in clause (iii) of this subparagraph required to stay within available funding, in accordance with §355.201 of this title.

(vi) Notwithstanding any other provision, HHSC will not assign to any hospital a final SDA that will reimburse the hospital more than its estimated cost of providing Medicaid services, using base year claims for federal fiscal year 2008.

(vii) The hospitals described in paragraph (8) of this subsection will be assigned a PDSDA that is adjusted as described in subparagraph (A)(i) of this paragraph.

(C) No adjustment to a hospital's PDSDA under this paragraph can result in a final SDA that is below the minimum PDSDA described in paragraph (6)(D) of this subsection.

(e) Diagnosis Related Groups (DRGs) Statistical Calculations. HHSC adopts the classification of diagnoses defined in the Medicare DRG prospective payment system unless a revision is required based on Texas claims data or other factors, as determined by HHSC. HHSC recalibrates the relative weights, mean length of stay, and day outlier threshold whenever the PDSDAs are recalculated.

(1) Recalibration of relative weights. HHSC calculates a relative weight for each DRG as follows:

(A) Base year claims are grouped by DRG;

(B) For each DRG, HHSC:

(i) sums the base year costs per claim as determined in subsection (d)(3)(A) of this section;

(ii) divides the result in clause (i) of this subparagraph by the number of claims in the DRG; and

(iii) divides the result in clause (ii) of this subparagraph by the universal mean, resulting in the relative weight for the DRG.

(2) Recalibration of mean length of stay (MLOS). HHSC calculates a mean length of stay (MLOS) for each DRG as follows:

(A) Base year claims are grouped by DRG;

(B) For each DRG, HHSC:

(i) sums the number of days billed for all base year claims;

(ii) divides the result in clause (i) of this subparagraph by the number of claims in the DRG, resulting in the MLOS for the DRG.

(3) Recalibration of day outlier thresholds. HHSC calculates a day outlier threshold for each DRG as follows:

(A) Calculates for all claims the standard deviations from the MLOS in paragraph (2) of this subsection;

(B) Removes each claim with a length of stay (number of days billed by a hospital) greater than or equal to three standard deviations above or below the MLOS. The remaining claims are those with a length of stay less than three standard deviations above or below the MLOS;

(C) Sums the number of days billed by all hospitals for a DRG for the remaining claims in subparagraph (B) of this paragraph;

(D) Divides the result in subparagraph (C) of this paragraph by the number of remaining claims in subparagraph (B) of this paragraph;

(E) Calculates one standard deviation for the result in subparagraph (D) of this paragraph; and

(F) Multiplies the result in subparagraph (E) of this paragraph by two and adds that to the result in subparagraph (D) of this paragraph; resulting in the day outlier threshold for the DRG.

(4) If a DRG has fewer than ten base year claims, HHSC will assign the corresponding Medicare relative weight and Medicare mean length of stay and will calculate the day outlier threshold based on the Medicare mean length of stay and standard deviation.

(5) If one of the DRGs specific to an organ transplant has less than five base year claims, HHSC will assign the corresponding Medicare relative weight and Medicare mean length of stay and will calculate the day outlier threshold based on the Medicare mean length of stay and standard deviation. In addition, HHSC adds a relative weight to account for the cost of procuring the organ to the Medicare relative weight for the DRG. HHSC uses the organ procurement costs published by the Acquisition of Organ Procurement Organization (AOPO). To calculate the relative weight for procurement, HHSC divides the average cost of organ procurement by the universal mean for all claims.

(f) Request for Review. Except as otherwise provided in this subsection, HHSC uses the following process for reviews and appeals.

(1) If a hospital believes that HHSC made a mathematical error or data entry error in calculating the hospital's PDSDA, the hospital may request a review of the disputed calculation.

(A) A review of the calculation of a hospital's PDSDA will not be granted if the disputed calculation is the result of the hospital's submission of incorrect data or the result of the use of an interim rate derived from a cost reporting period occurring before the base year.

(B) The hospital must submit to HHSC a written request for review and appropriate specific documentation supporting its contention that there has been a mathematical or data entry error. The written request for review must be printed on the hospital's letterhead. HHSC Rate Analysis must receive a written request for an informal review by hand delivery, United States (U.S.) mail, or special mail delivery no later than 45 calendar days from the date of the initial PDSDA notification letter. If the 45th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 45th calendar day is the final day the receipt of the written request will be accepted. HHSC will not grant extensions of the 45-day deadline.

(C) If the hospital disagrees with the outcome of the review, the hospital may formally appeal in accordance with §§357.481 - 357.490 of this title (relating to Hearings Under the Administrative Procedure Act).

(2) A hospital may not request a review pursuant to this paragraph regarding the elements of the prospective payment methodology used by HHSC, including:

(A) the payment division methodologies, including the HSDA, PDI, and PDSDA calculations;

(B) the DRGs assigned through claims adjudication;

(C) the DRGs assigned to base year claims as a result of HHSC updating to a new version of the Medicare DRGs;

(D) the relative weights assigned to the DRGs;

(E) the adequacy of payments;

(F) the exclusion of claims that were not adjudicated and paid within the base year or six-month grace period; [~~and~~]

(G) the interim rate, computed as a result of tentative or final cost reports covering the base year that are completed after the date HHSC sends the initial PDSDA notification letter to the hospital; and

(H) the final SDA resulting from adjustments to a hospital's PDSDA made pursuant to subsection (d)(12) of this section.

(g) Reimbursements.

(1) Calculating the payment amount. HHSC reimburses a hospital a prospective payment for covered inpatient hospital services by multiplying the hospital's PDSDA or final SDA if adjustments were made under subsection (d)(12) of this section [~~for the hospital's payment division~~] by the relative weight for the DRG assigned to the adjudicated claim. The resulting amount is the payment amount to the hospital.

(2) The prospective payment as described in paragraph (1) of this subsection is considered full payment for covered inpatient hospital services. A hospital's request for payment in an amount higher than the prospective payment will be denied. The PDSDA or final SDA result in subsection (d) of this section includes but is not limited to the following:

(A) capital costs;

(B) cost of indirect medical education;

(C) cost of malpractice insurance; and

(D) return on equity.

(3) Day and cost outlier adjustments. HHSC pays a day outlier or a cost outlier for medically necessary inpatient services provided to clients under age 21 in all Medicaid participating hospitals that are reimbursed under the prospective payment system. If a patient age 20 is admitted to and remains in a hospital past his or her twenty-first (21st) birthday, inpatient days and hospital charges after the patient reaches age 21 are included in calculating the amount of any day outlier or cost outlier payment adjustment.

(A) Day outlier payment adjustment. HHSC calculates a day outlier payment adjustment for each claim as follows:

(i) determines whether the number of medically necessary days allowed for a claim exceeds:

(I) the MLOS by more than two days; and

(II) the DRG day outlier threshold as calculated in subsection (e)(3)(F) of this section;

(ii) if clause (i) of this subparagraph is true, subtracts the DRG day outlier threshold from the number of medically necessary days allowed for the claim;

(iii) multiplies the DRG relative weight by the PDSDA or final SDA if adjustments were made under subsection (d)(12) of this section;

(iv) divides the result in clause (iii) of this subparagraph by the DRG MLOS described in subsection (e)(2) of this section, to arrive at the DRG per diem amount;

(v) multiplies the number of days in clause (ii) of this subparagraph by the result in clause (iv) of this subparagraph; and

(vi) multiplies the result in clause (v) of this subparagraph by 70 percent.

(B) Cost outlier payment adjustment. HHSC makes a cost outlier payment adjustment for an extraordinarily high-cost claim as follows:

(i) to establish a cost outlier, the cost outlier threshold must be determined by first selecting the lesser of the universal mean of base year claims multiplied by 11.14 or the hospital's PDSDA or final SDA multiplied by 11.14;

(ii) the full DRG prospective payment amount is multiplied by 1.5;

(iii) the cost outlier threshold is the greater of clause (i) or (ii) of this subparagraph;

(iv) the cost outlier threshold is subtracted from the amount of reimbursement for the claim established under cost reimbursement principles described in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA); and

(v) the result in clause (iv) of this subparagraph is multiplied by 70 percent to determine the amount of the cost outlier payment.

(C) If an admission qualifies for both a day outlier and a cost outlier payment adjustment, HHSC pays the higher outlier payment.

(D) If the hospital claim resulted in a downgrade of the DRG related to reimbursement denials or reductions for preventable adverse events, the outlier payment will be determined by the lesser

of the calculated outlier payment for the non-downgraded DRG or the downgraded DRG.

(4) A hospital may submit a claim to HHSC before a patient is discharged, but only the first claim for that patient will be reimbursed the prospective payment described in paragraph (1) of this subsection. Subsequent claims for that stay are paid zero dollars. When the patient is discharged and the hospital submits a final claim to ensure accurate calculation for potential outlier payments for clients younger than 21 years of age, HHSC recoups the first prospective payment and issues a final payment in accordance with paragraphs (1) and (3) of this subsection.

(5) Patient transfers and split billing. If a patient is transferred, HHSC establishes payment amounts as specified in subparagraphs (A) - (D) of this paragraph. HHSC manually reviews transfers for medical necessity and payment.

(A) If the patient is transferred from a hospital to a nursing facility, HHSC pays the transferring hospital the total payment amount of the patient's DRG.

(B) If the patient is transferred from one hospital (transferring hospital) to another hospital (discharging hospital), HHSC pays the discharging hospital the total payment amount of the patient's DRG. HHSC calculates a DRG per diem and a payment amount for the transferring hospital as follows:

(i) multiplies the DRG relative weight by the PDSDA or final SDA;

(ii) divides the result in clause (i) of this subparagraph by the DRG MLOS described in subsection (e)(2) of this section, to arrive at the DRG per diem amount; and

(iii) to arrive at the transferring hospital's payment amount:

(I) multiplies the result in clause (ii) of this subparagraph by the lesser of the DRG MLOS, the transferring hospital's number of medically necessary days allowed for the claim, or 30 days; or

(II) for a patient under age 21, multiplies the result in clause (ii) of this subparagraph by the lesser of the DRG MLOS or the transferring hospital's number of medically necessary days allowed for the claim.

(C) HHSC makes payments to multiple hospitals transferring the same patient by applying the per diem formula in subparagraph (B) of this paragraph to all the transferring hospitals and the total DRG payment amount to the discharging hospital.

(D) HHSC performs a post-payment review to determine if the hospital that provided the most significant amount of care received the total DRG payment. If the review reveals that the hospital that provided the most significant amount of care did not receive the total DRG payment, an adjustment is initiated to reverse the payment amounts. The transferring hospital is paid the total DRG payment amount and the discharging hospital is paid the DRG per diem.

(h) Cost reports. Each hospital must submit an initial cost report at periodic intervals as prescribed by Medicare or as otherwise prescribed by HHSC.

(1) Each hospital must send a copy of all cost reports audited and amended by a Medicare intermediary to HHSC within 30 days after the hospital's receipt of the cost report. Failure to submit copies or respond to inquiries on the status of the Medicare cost report will result in provider vendor hold.

(2) HHSC uses data from these reports in rebasing rate years to recalculate PDSDAs and make adjustments as described in subsection (d) of this section, and to complete cost settlements for children's hospitals and state-owned teaching hospitals as outlined in §355.8054 and §355.8056 of this chapter.

(3) HHSC may require a hospital to provide additional data in a format and at a time specified as otherwise prescribed by HHSC.

(4) Except as otherwise specified in subsection (i) of this section, there are no cost settlements for inpatient services under the prospective payment system in this section.

(5) For hospitals reimbursed under this section, the cost settlement process is not limited by the TEFRA target cap.

(i) Hospitals in counties with 50,000 or fewer persons and certain other hospitals.

(1) Hospitals are reimbursed under this subsection if, as of the most recent decentennial census, the hospital is:

(A) located in a county with 50,000 or fewer persons;

(B) a Medicare-designated Rural Referral Center (RRC) or Sole Community Hospital (SCH) not located in a metropolitan statistical area (MSA), as defined by the U.S. Office of Management and Budget; or

(C) a Medicare-designated Critical Access Hospital (CAH).

(2) A hospital that qualifies under this subsection is reimbursed for a cost reporting period the greater of:

(A) All Medicaid payments based on the prospective payment system; or

(B) The cost-reimbursement methodology described in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) without the imposition of the TEFRA target cap described in subsection (c)(35) [~~(e)(34)~~] of this section.

(3) The amounts in this subsection are calculated using the most recent data for Medicaid Fee-for-Service (FFS) and Primary Care Case Management (PCCM) inpatient services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005102
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 424-6576

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 29. ECONOMIC DEVELOPMENT

SUBCHAPTER D. TEXAS RURAL INVESTMENT FUND PROGRAM

4 TAC §§29.60 - 29.66

The Texas Department of Agriculture (department) proposes new Chapter 29, Subchapter D, §§29.60 - 29.66, concerning the Texas Rural Investment Fund Program. These sections are being proposed pursuant to the authority granted to the department in §12.046(g) of the Texas Agriculture Code. The new sections are proposed to establish the Texas Rural Investment Fund Program (program), which, when funded, will provide grants or loans in order to stimulate economic development in rural areas of Texas.

Rick Rhodes, assistant commissioner for rural economic development, has determined that for the first five years the new sections are in effect, there may be a fiscal effect on state or local government based on appropriations for the program, and the types of grants or loans offered through the program. To date, no appropriations have been made for the program, the department has not hired any employees to implement the program, and there have been no grants or loans awarded under the program.

Mr. Rhodes has also determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of implementing the new sections will be to provide grants or loans in rural areas in order to stimulate certain types of economic development in those areas, including local entrepreneurship, job creation or retention, new capital investment, strategic economic development planning, individual economic and community development leadership training, housing development, or innovative workforce education. There will be no cost to individuals, micro-businesses and small businesses as a result of enforcing or administering the new sections.

Comments on the proposal may be submitted to Rick Rhodes, Assistant Commissioner for Rural Economic Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

Chapter 29, Subchapter D, §§29.60 - 29.66 is proposed under the Texas Agriculture Code, §12.046(g), which provides that the department shall adopt rules to administer the program.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§29.60. Authority.

Pursuant to §12.046 of the Texas Agriculture Code, the Texas Department of Agriculture establishes the Texas Rural Investment Fund Program.

§29.61. Purpose.

The Texas Rural Investment Fund was established by Senate Bill 1016, 81st Texas Legislature, R.S., as an economic development program for Rural Communities.

§29.62. Definitions.

The following words and terms when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Act--Section 12.046 of the Texas Agriculture Code, enacted in Senate Bill 1016, 81st Texas Legislature, R.S.

(2) Commissioner--The Commissioner of the Texas Department of Agriculture.

(3) Department--The Texas Department of Agriculture.

(4) Fund--The Texas Rural Investment Fund, which is a dedicated account in the general revenue fund for the State of Texas and consists of:

(A) appropriations of money to the fund by the legislature;

(B) gifts, grants, including federal grants, and other donations received for the fund; and

(C) interest earned on the investment of money in the fund.

(5) Program--Loans or grants made from the Fund for the purposes set forth in §29.63 of this title (relating to Financial Assistance Available Under the Program).

(6) Rural Communities--Municipalities with a population of less than 50,000 or counties with a population of less than 200,000.

§29.63. Financial Assistance Available Under the Program.

The Fund may be used by the Department only to pay for grants or loans to public or private entities for projects in Rural Communities that have strong local support, provide positive return on the state's investment, and stimulate one or more of the following:

(1) local entrepreneurship;

(2) job creation or retention;

(3) new capital investment;

(4) strategic economic development planning;

(5) individual economic and community development leadership training;

(6) housing development; or

(7) innovative workforce education.

§29.64. Administration.

The Department shall administer the Program and any grants or loans provided under the Program.

§29.65. Evaluation of Projects.

In awarding a grant or loan of money from the Fund for a project, the Department shall consider:

(1) the project's effect on job creation and wages;

(2) the financial strength of the applicant;

(3) the applicant's business history;

(4) an analysis of the relevant business sector;

(5) whether there is public or private sector financial support for the project; and

(6) whether there is local support for the project.

§29.66. Request for Proposals.

Upon funding of the Program, the Department will issue one or more Requests for Proposals for qualifying projects, at such times and upon such terms, as determined by the Department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005100
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-4075

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SUBCHAPTER E. RURAL ECONOMIC DEVELOPMENT AND INVESTMENT PROGRAM

4 TAC §§29.70 - 29.77

The Texas Department of Agriculture (department) proposes new Chapter 29, Subchapter E, §§29.70 - 29.77, concerning the Rural Economic Development and Investment Program. These sections are being proposed pursuant to the authority granted to the department in §12.0271(e) of the Texas Agriculture Code. The new sections are proposed to establish the Rural Economic Development and Investment Program (program) as a financial assistance program to encourage private development in rural areas of Texas.

Rick Rhodes, assistant commissioner for rural economic development, has determined that for the first five years the new sections are in effect, there may be a fiscal effect on state or local government based on appropriations for the program, and the types of financial assistance offered through the program. To date, no appropriations have been made for the program, the department has not hired any employees to implement the program, and there has been no financial assistance provided under the program.

Mr. Rhodes has also determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of implementing the new sections will be to encourage private development in rural areas. The financial assistance provided under this program may be used for: the acquisition or development of land, easements, or rights-of-way; attracting new private enterprises to rural counties and municipalities; the construction, extension, or other improvement of water or waste disposal facilities or transportation infrastructure; or any other activity relating to private economic development that will encourage economic and infrastructure development in a rural area. Methods of financial assistance include loans, credit enhancements, assistance to lower interest rates, purchase or lease financing, or other methods of leveraging money from sources other than Texas, to eligible entities for eligible projects. There will be no cost to individuals, micro-businesses and small businesses as a result of enforcing or administering the new sections.

Comments on the proposal may be submitted to Rick Rhodes, Assistant Commissioner for Rural Economic Development, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

Chapter 29, Subchapter E, §§29.70 - 29.77 is proposed under the Texas Agriculture Code, §12.0271(e), which provides that the department shall adopt rules to implement the program.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§29.70. Authority.

Pursuant to §12.0271 of the Texas Agriculture Code, the Texas Department of Agriculture establishes the Rural Economic Development and Investment Program.

§29.71. Purpose.

The Rural Economic Development and Investment Program was established by Senate Bill 1016, 81st Texas Legislature, R.S., as a financial assistance program to encourage private development in rural areas.

§29.72. Definitions.

The following words and terms when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Act--Section 12.0271 of the Texas Agriculture Code, enacted in Senate Bill 1016, 81st Texas Legislature, R.S.

(2) Commissioner--The Commissioner of the Texas Department of Agriculture.

(3) Department--The Texas Department of Agriculture.

(4) Community Development Financial Institution--A Texas Community Development Financial Institution certified by the United States Department of the Treasury in accordance with the federal Community Development Banking and Financial Institutions Act of 1994, 12 United States Code, §4701, et seq.

(5) Economic Development Corporation--A Texas nonprofit corporation in good standing that has obtained a letter ruling from the United States Internal Revenue Service confirming its status as a nonprofit organization described in §501(c)(3) of the Internal Revenue Code of 1986, and whose purpose is to promote economic development in Texas rural areas.

(6) Eligible Entity--Defined in §29.73 of this title (relating to Eligible Entity).

(7) Nonretail Enterprise--A private enterprise whose sole business is selling to retailers or jobbers, rather than to consumers.

(8) Program--The Rural Economic Development and Investment Program established by the Act and this subchapter.

§29.73. Eligible Entity.

Financial assistance under the Program may be provided only to:

(1) a county with a population of not more than 75,000;

(2) a municipality with a population of not more than 50,000; or

(3) an Economic Development Corporation or Community Development Financial Institution that primarily represents a county or municipality described in paragraphs (1) and (2) of this section.

§29.74. Financial Assistance Available Under the Program.

Financial assistance under the Program may be used only for a project relating to:

(1) the acquisition or development of land, easements, or rights-of-way;

(2) attracting new private enterprises to the county or municipality, including:

(A) manufacturing facilities;

(B) freight storage facilities;

(C) distribution warehouse centers; and

(D) other Nonretail Enterprises;

(3) the construction, extension, or other improvement of:

(A) water or waste disposal facilities; or

(B) transportation infrastructure;

(4) any other activity relating to private economic development that the Commissioner determines will encourage economic and infrastructure development in a rural area.

§29.75. Methods of Providing Financial Assistance.

The Commissioner may provide financial assistance to an Eligible Entity by:

(1) extending credit by direct loan, based on the credit of the Eligible Entity;

(2) providing a credit enhancement;

(3) effectively lowering interest rates;

(4) financing a purchase or lease agreement in connection with an economic or infrastructure development project; or

(5) providing methods of leveraging money from sources other than this state that are related to the project for which assistance is provided.

§29.76. Segregation of Funds by Eligible Entity.

An Eligible Entity that receives funds under the Program shall segregate Program funds from other funds under its control. The Eligible Entity may use Program funds only for a project approved by the Commissioner. All funds disbursed under the Program must be repaid on terms determined by the Department.

§29.77. Request for Proposals.

Upon funding of the Program, the Department will issue one or more Requests for Proposals for qualifying projects, at such times and upon such terms, as determined by the Department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005101
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 8. PIPELINE SAFETY REGULATIONS

SUBCHAPTER C. REQUIREMENTS FOR NATURAL GAS PIPELINES ONLY

16 TAC §8.209

The Railroad Commission of Texas proposes new §8.209, relating to Distribution Facilities Replacements. On July 6, 2010, the Commission authorized staff to draft a proposed new rule to address mandatory replacement of steel service lines and other facilities in natural gas distribution systems. The Pipeline Safety Division hosted a public workshop on August 18, 2010, with interested persons and stakeholders to discuss the elements of the draft proposed rule. During the workshop, the attendees and Commission staff discussed the draft proposed rule and many of the comments are reflected in this revised proposal.

Proposed new subsection (a) states that, effective January 1, 2011, the new section applies to each operator of a gas distribution system that is subject to the requirements of 49 CFR Part 192. The section prescribes the minimum requirements by which all operators will develop and implement a risk-based program for the removal or replacement of distribution facilities, including steel service lines, in such gas distribution systems. Each operator's risk-based program will be developed in conjunction with the recently adopted Pipeline and Hazardous Materials Safety Administration's (PHMSA) regulations regarding integrity management for distribution operators. Operators will use the risk-based program to manage any risks identified through the risk-based analysis by developing a replacement program to remove those integrity related risks from the pipeline systems.

Proposed new subsection (b) requires that each operator use welding or fusing to make all below-ground joints wherever practical. Where joints involving polyethylene pipe are made by mechanical means, the joints must meet the requirements of ASTM D2513 and be designated as a Category 1 type joint. Non-welded joints on steel pipe must comply with the requirements of 49 CFR §192.273.

Proposed new subsection (c) directs that no later than March 1, 2011, each operator must establish and submit to the Pipeline Safety Division for review and approval the operator's written procedures for implementing the requirements of this section. Each operator must develop a risk-based program that determines the relative risks and probable consequences associated with the operation of each pipeline system or segment. The risk evaluation will combine the efforts of the Distribution Integrity Management Program, the risk-based leak survey program, and the data submitted on the PS-95 to develop a risk-based replacement program to eliminate or reduce the highest ranked risks. Each operator that determines that steel service lines are the greatest risk must conduct the steel service line leak repair analysis set forth in subsection (d) of this section and use the prescriptive model within subsections (f) and (g) of this section for the replacement of those steel service lines. Within 90 days after receipt of an operator's written procedures, the Pipeline Safety Division must either notify the operator of the acceptance of the plan or complete an evaluation of the plan to determine compliance with this section. If the Pipeline Safety Division determines that an operator's procedures do not comply with the requirements of this section, the operator must modify its procedures as directed by the Pipeline Safety Division.

Proposed new subsection (d) requires each operator to use data collected under its distribution integrity management plan (DIMP) and PS-95 to determine the potential relative risks associated with each of the operator's distribution systems by identifying pipeline segments or facilities for replacement. The operator must support the analysis with data, collected to

validate system integrity, that allow for the identification of segments or facilities within the system that have the potential for the greatest risk or consequence in the event of a failure. The operator must identify in its risk-based program the distribution piping, by segment, that poses the greatest risk to the operation of the system. Until the Commission has collected three full calendar years of data submitted on the PS-95, operators may use two calendar years of data to perform the required analysis. Once the Commission has collected three full calendar years of data submitted on the PS-95, each operator must conduct a review of its leak repairs using the most recent three calendar years of data reported to the Commission on Form PS-95 and must categorize the leak repairs for the reporting period. In addition, each operator that determines that steel service lines are the greatest risk must conduct a steel service line leak repair analysis to determine the leak repair rate for steel service lines compared to all repaired leaks within the system ID. The leak repair rate for below-ground steel service lines is determined by dividing the number of below-ground leaks repaired on steel service lines (excluding third party leaks) by the total number of leaks repair on the pipeline system.

The risk-based program must identify the distribution piping, by segment, that poses the greatest risk to the operation of the system. To determine the segmentation of the piping, each operator should use the risk factors that are set forth in subsection (e). The operator must include in the risk model factors related to risk, such as prior leak grade repairs, class locations, leak rate history, age of pipe, and soil conditions as explained in paragraphs (1) - (5) of subsection (e). The determination of risk is based on the degree of hazard associated with the risk factors assigned to the segments. The priority of service line or facility replacement is determined by classifying each pipeline segment based on its degree of hazard associated with each risk factor. Each operator must establish its own risk ranking for pipeline segments to determine the priority for service line or facility replacements.

Proposed new subsection (f) applies to operators that determine under subsection (c) that steel service lines are the greatest risk, and requires such operators to use a prescriptive model under subsection (g) for steel service line replacement. Proposed new subsection (f) directs that, based on the results of the leak repair rate analysis under subsection (e), each operator must categorize each system by segment within each system as one of the following priorities: a segment with a below-ground steel service line leak repair rate of 25% or greater is a Priority 1 segment; a segment with a below-ground steel service line leak repair rate of 5% or greater but less than 25% is a Priority 2 segment; and a segment with a below-ground steel service line leak repair rate of less than 5% is a Priority 3 segment. An operator is not required to remove or replace any Priority 3 segments; however, upon discovery of a leak on a Priority 3 segment, the operator must remove or replace rather than repair those lines, except as specifically provided in subsection (g).

Proposed new subsection (g) applies to operators that determine under subsection (c) that steel service lines are the greatest risk. Subsection (g) provides that for those steel service lines that must remain in service, each operator must determine if an integrity risk exists on the segment, and if so must replace the segment with steel as part of the integrity management plan. Each operator must complete the removal or replacement of steel service lines by segment according to the risk ranking established pursuant to subsection (f) of this section. For Priority 1 segments, an operator must complete the removal or replacement of steel service lines by June 30, 2013, and for Priority 2 segments, an operator must remove or replace no less than 10% of the original inventory per year. For Priority 3 segments, an operator is not required to remove or replace any steel service lines; however, upon discovery of a leak on a steel service line, that line must be replaced rather than repaired, except where steel is the continued service line material.

Subsection (h) requires each operator to establish a schedule for the replacement of other distribution facilities according to risk. Operators must submit the schedule to the Pipeline Safety Division for review and approval or amendment under subsection (c) of this section. Unless an operator has secured an alternative replacement schedule, all replacements programs require a minimum annual replacement rate of 5%.

Proposed new subsection (i) directs that in conjunction with the filing of the pipeline safety user fee pursuant to §8.201 of this title (relating to Pipeline Safety Program Fees) and no later than March 15 of each year, each operator must file with the Pipeline Safety Division a list by System ID of the steel service lines and other distribution facilities replaced during the prior calendar year; and the operator's proposed removal or replacement work plan for the current calendar year, the implementation of which is subject to review and amendment by the Pipeline Safety Division. Operators must notify the Pipeline Safety Division of any revisions to the proposed work plan and, if requested, provide justification for the revision. Within 45 days after receipt of an operator's work plan, the Pipeline Safety Division will notify the operator either of the acceptance of the plan or of the necessary modifications to the plan.

Proposed new subsection (j) provides that each operator of a gas distribution system that is subject to the requirements of §7.310 of this title (relating to System of Accounts) may use, in accordance with the General Instructions of the FERC USOA, subaccounts to segregate and accurately account for amounts expended to comply with the requirements of this section. This subsection does not render any final determination of the reasonableness or necessity of any investment or expense.

Mary McDaniel, P.E., Director, Pipeline Safety Division, has determined that for each of the first five years the proposed new rule will be in effect, there will be no fiscal implications for state government. The Commission's Pipeline Safety Division will review operators' risk-based programs and annual work plans with existing personnel and within the current budget.

There will be fiscal implications for those local governments, primarily municipalities, that operate natural gas distribution systems, which would be similar to those for operators of similarly-sized and configured investor owned gas distribution systems. These costs are described in subsequent paragraphs.

The Commission's records show that there are 117 natural gas distribution systems, of which 86 are municipally owned and 31 are investor owned. There is likely to be an increased cost of compliance for some if not all operators of gas distribution systems, both investor owned and municipally owned, for the requirements that operators develop either a risk-based program or a service line prescriptive program for performing leak repair rate analyses on distribution systems; analyze leak data to determine a system's priority status; and establish priorities for replacements of certain distribution facilities. The Commission estimates that the time required for an operator to complete these initial calculations will be less than three months, including the time to identify within the systems the more discrete segment levels for those operators that have identified underground steel

service lines as their highest relative risk. The Commission estimates that performing the calculations and segment identification will not involve a significant cost because these can be done with the computer programs and data models that gas distribution operators put into place in compliance with the requirements of §8.210 (relating to Reports), and, more specifically, subsection (e) of that rule, pertaining to mandatory leak reporting on Form PS-95. For the operators of smaller gas distribution systems, the calculations and segment identification can be completed manually at a much quicker pace.

Ms. McDaniel estimates that the time to develop the risk model will be at least a year. The process will involve manipulating the raw data to the segment level and prioritizing the replacement of the service lines or other facility as identified by the risk model. Ms. McDaniel estimates that two engineers with computer assistance could develop the risk models, including implementation of any computer programs, at an approximate cost of $500,000 per year. Operators of smaller systems could elect to use the available models, with no additional costs, or hire a consultant at an approximate annual cost of $100,000 to develop a risk model that would assist over the long term in developing the distribution integrity management plan.

Ms. McDaniel estimates that for operators of all gas distribution systems, both municipally owned and investor owned, there is likely to be an increased capital cost because of the requirement to replace segments sooner than they might otherwise be replaced within a system. Ms. McDaniel estimates that an operator would need approximately two hours to replace each service line, at an approximate cost of $1,200 each. There is likely to be an increased cost of compliance for operators of all gas distribution systems because of new reporting requirements.

Ms. McDaniel has determined that for each year of the first five years that the new rule will be in effect, the primary public benefit will be increased operating safety of gas distribution systems.

The Commission has also developed an analysis of the probable economic cost to persons required to comply with the proposed new rule for each year of the first five years that it will be in effect, as well as the analysis required by Texas Government Code, §2006.002. That statute requires that, before adopting a rule that may have an adverse economic effect on small businesses or micro-businesses, a state agency prepare an economic impact statement and a regulatory flexibility analysis. The economic impact statement must estimate the number of small businesses or micro-businesses subject to the proposed rule, project the economic impact of the rule on small businesses and micro-businesses, and describe alternative methods of achieving the purpose of the proposed rule. A regulatory flexibility analysis must include the agency's consideration of alternative methods of achieving the purpose of the proposed rule. The analysis must consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses and micro-businesses. The state agency must include in the analysis several proposed methods of reducing the adverse impact of a proposed rule on a small business or a micro-business. The statute defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. A "micro-business" is defined as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has no more than 20 employees.

The Commission has determined that there will be an increased cost of compliance for operators of investor owned gas distribution systems, regardless of status as a small business or micro-business, for the proposed new rule. Commission records show that there are approximately 117 operators of gas distribution systems, of which 31 are investor owned and operated natural gas distribution systems. Some of these entities are small businesses, and some of them may be micro-businesses or sole proprietorships. The Comptroller of Public Accounts shows a total of 144 businesses engaged in natural gas distribution, of which 119 are classified as small businesses under Texas Government Code, §2006.002. However, the Commission does not collect information--such as annual gross receipts and number of employees--that would allow the Commission to determine more specifically how many of these investor owned entities are small businesses or micro-businesses.

There is likely to be an increased cost of compliance for all operators of gas distribution systems for the requirements that operators develop either a risk-based program or a service line prescriptive program for performing leak rate analyses on distribution systems; analyze leak data to determine a system's category status; and establish priorities for replacements of certain distribution facilities. The Commission estimates that the time required for an operator to complete these initial calculations will be less than three months, including the time to identify within the systems the more discrete segment levels for those operators of Category 1 systems. The Commission estimates that performing the calculations and segment identification will not involve a significant cost because these can be done with the computer programs and data models that gas distribution operators put into place in compliance with the requirements of §8.210 (relating to Reports), and, more specifically, subsection (e) of that rule, pertaining to mandatory leak reporting on Form PS-95. For the operators of smaller gas distribution systems, the calculations and segment identification can be completed manually at a much quicker pace.

The Commission estimates that the time to develop the risk model will be at least a year. The process will involve manipulating the raw data to the segment level and prioritizing the replacement of the service lines or other facility as identified by the risk model. The Commission estimates that two engineers with computer assistance could develop the risk models, including implementation of any computer programs, at an approximate cost of $500,000 per year. Operators of smaller systems could elect to use the prescriptive model, with no additional costs, or hire a consultant at an approximate annual cost of $100,000 to develop risk model which would assist over the long term in developing the distribution integrity management plan.

The Commission estimates that for operators of all gas distribution systems, there is likely to be an increased capital cost because of the requirement to replace segments sooner than they might otherwise be replaced within a system. The Commission estimates that an operator would need approximately two hours to replace each service line, at an approximate cost of $1,200 each. There is likely to be an increased cost of compliance for operators of all gas distribution systems because of new reporting requirements.

In preparing this rulemaking proposal, the Commission considered whether there were any alternative methods for achieving

the purpose of this proposal. The Commission could have proposed no changes in the pipeline safety regulations and continued having staff strongly encourage operators to replace leaking service lines rather than repairing them. However, the Commission has determined that voluntary, piecemeal replacement of leaking service lines is inconsistent with the requirement that operators maintain system integrity, and thus is inadequate to ensure the safety and welfare of gas distribution system customers and others. The Commission has concluded that requiring all gas distribution system operators to meet consistent minimum standards for evaluating risk and replacing leaking distribution system facilities is essential to the goal of ensuring the health, safety, and environmental and economic welfare of the State. Minimizing any adverse impacts on small businesses is inconsistent with this goal. Safety standards for gas distribution systems, which are located in the most densely populated areas of the State, should not be made any less stringent merely because the owner or operator of the system is an individual, a small business, or a micro-business.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments until 12:00 p.m. (noon) on Tuesday, October 12, 2010, which is 32 days after expected publication in the *Texas Register* on September 10, 2010. The Commission finds that this comment period is reasonable because the initial proposal was the subject of a workshop held at the Railroad Commission offices on August 18, 2010, that was open to all interested persons and stakeholders, and because the current proposal as well as an online comment form will be available on the Commission's web site no later than the day after the open meeting at which the Commission approves publication of the proposal, giving interested persons over two additional weeks to review, analyze, draft, and submit comments. Comments should refer to GUD Docket No. 9997. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call David Flores at (512) 463-7058. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the new rule under Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all common carrier pipelines in Texas, persons owning or operating pipelines in Texas and their pipelines and oil and gas wells, and authorize the Commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission as set forth in §81.051, including such rules as the Commission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and their operations; and Texas Utilities Code, §§121.201 - 121.210, which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq.*

Texas Natural Resources Code, §§81.051 and 81.052; Texas Utilities Code, §§121.201 - 121.211; and 49 United States Code Annotated, §§60101, *et seq.,* are affected by the proposed new rule.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Utilities Code, §§121.201 - 121.211; and 49 United States Code Annotated, §§60101, *et seq.*

Cross-reference to statute: Texas Natural Resources Code, Chapter 81; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

Issued in Austin, Texas on August 30, 2010.

§8.209. Distribution Facilities Replacements.

(a) Effective January 1, 2011, this section applies to each operator of a gas distribution system that is subject to the requirements of 49 CFR Part 192. This section prescribes the minimum requirements by which all operators will develop and implement a risk-based program for the removal or replacement of distribution facilities, including steel service lines, in such gas distribution systems. The risk-based program will work in conjunction with the Distribution Integrity Management Program (DIMP) using scheduled replacements to manage identified risks associated with the integrity of distribution facilities.

(b) Each operator must use welding or fusing to make joints on below-ground piping where practical. Each non-fused joint on a plastic system must meet the requirements of ASTM D2513 for Category 1 fittings. Each non-welded joint on a steel system must meet the requirements of 49 CFR §192.273.

(c) No later than March 1, 2011, each operator must establish and submit to the Pipeline Safety Division for review and approval the operator's written procedures for implementing the requirements of this section. Each operator must develop a risk-based program to determine the relative risks and their associated consequences within each pipeline system or segment. Each operator that determines that steel service lines are the greatest risk must conduct the steel service line leak repair analysis set forth in subsection (d) of this section and use the prescriptive model within subsections (f) and (g) of this section for the replacement of those steel service lines. Within 90 days after receipt of an operator's written procedures, the Pipeline Safety Division must either notify the operator of the acceptance of the plan or complete an evaluation of the plan to determine compliance with this section. If the Pipeline Safety Division determines that an operator's procedures do not comply with the requirements of this section, the operator must modify its procedures as directed by the Pipeline Safety Division.

(d) In developing its risk-based program, each operator must use data collected under its DIMP and the data submitted on the PS-95 to determine the risks associated with each of the operator's distribution systems and identify pipeline segments or facilities for replacement. The operator must support the analysis with data, collected to validate system integrity, that allow for the identification of segments or facilities within the system that have the highest relative risk ranking or consequence in the event of a failure. The operator must identify in its risk-based program the distribution piping, by segment, that poses the greatest risk to the operation of the system. Until the Commission has collected three full calendar years of data submitted on the PS-95, operators may use two calendar years of data to perform the required analysis. Once the Commission has collected three full calendar years of data submitted on the PS-95, each operator must conduct a review of its leak repairs using the most recent three calendar years of data reported to the Commission on Form PS-95 and must categorize the leak repairs for the reporting period. In addition, each operator that determines that steel service lines are the greatest risk must conduct a steel service line leak repair analysis to determine the leak repair rate for steel service lines compared to all repaired leaks within the system ID. The leak repair rate for below-ground steel service lines is determined by dividing the number of below-ground leaks repaired on steel service

lines (excluding third party leaks) by the total number of leaks repair on the pipeline system.

(e) Each operator must create a risk model that will identify by segment those lines that pose the highest risk ranking or consequence of failure. Each operator should include in the risk model factors related to risk, such as prior leak grade repairs, class locations, leak rate history, age of pipe, and soil conditions as explained in paragraphs (1) - (5) of this subsection. The determination of risk is based on the degree of hazard associated with the risk factors assigned to the segments. The priority of service line or facility replacement is determined by classifying each pipeline segment based on its degree of hazard associated with each risk factor. Each operator must establish its own risk ranking for pipeline segments to determine the priority for service line or facility replacements.

(1) Pipe location includes proximity to buildings or other structures and the type and use of the buildings and proximity to areas of concentrations of people.

(2) Composition and nature of the piping system includes the age of the pipe, materials, type of facilities, operating pressures, leak history records, prior leak grade repairs, and other studies.

(3) Corrosion history of the pipeline includes known areas of significant corrosion or areas where corrosive environments are known to exist, cased crossings of roads, highways, railroads, or other similar locations where there is susceptibility to unique corrosive conditions.

(4) Environmental factors that affect gas migration include conditions that could increase the potential for leakage or cause leaking gas to migrate to an area where it could create a hazard, such as extreme weather conditions or events (significant amounts or extended periods of rainfall, extended periods of drought, unusual or prolonged freezing weather, hurricanes, etc.); particular soil conditions; unstable soil; or areas subject to earth movement, subsidence, or extensive growth of tree roots around pipeline facilities that can exert substantial longitudinal force on the pipe and nearby joints.

(5) Any other condition known to the operator that has significant potential to initiate a leak or to permit leaking gas to migrate to an area where it could result in a hazard includes construction activity near the pipeline, wall-to-wall pavement, trenchless excavation activities (e.g., boring), blasting, large earth-moving equipment, heavy traffic, increase in operating pressure, and other similar activities or conditions.

(f) This subsection applies to operators that determine under subsection (c) of this section that steel service lines are the greatest risk and such operators must use a prescriptive model under subsection (g) of this section for steel service line replacement. Based on the results of the steel service line leak repair analysis under subsection (e) of this section, each operator must categorize each segment as follows:

(1) a segment with a steel service line leak rate of 25% or greater is a Priority 1 segment;

(2) a segment with a steel service line leak rate of 5% or greater but less than 25% is a Priority 2 segment; and

(3) a segment with a steel service line leak rate of less than 5% is a Priority 3 segment. An operator is not required to remove or replace any Priority 3 segments; however, upon discovery of a leak on a Priority 3 segment, the operator must remove or replace rather than repair those lines except as outlined in subsection (g) of this section.

(g) This subsection applies to operators that determine under subsection (c) of this section that steel service lines are the greatest risk. For those steel service lines that must remain in service, each operator must determine if an integrity risk exists on the segment, and if so, must replace the segment with steel as part of the integrity management plan. Operators must complete the removal or replacement of other steel service lines by segment according to the risk ranking established pursuant to subsection (e) of this section and according to the following schedule:

(1) For Priority 1 segments, an operator must complete the removal or replacement of steel service lines by June 30, 2013.

(2) For Priority 2 segments, an operator must remove or replace no less than 10% of the original inventory per year.

(3) For Priority 3 segments, an operator is not required to remove or replace any steel service lines; however, upon discovery of a leak on a steel service line, the operator must replace that line rather than repair it.

(h) Unless otherwise approved in an operator's risk-based plan, all replacement programs require a minimum annual replacement of 5% of the segments identified for replacement. Each operator must establish a schedule for the replacement of steel service lines or other distribution facilities according to risk, using a ranking from high to low, and must submit the schedule to the Pipeline Safety Division for review and approval or amendment under subsection (c) of this section.

(i) In conjunction with the filing of the pipeline safety user fee pursuant to §8.201 of this title (relating to Pipeline Safety Program Fees) and no later than March 15 of each year, each operator must file with the Pipeline Safety Division:

(1) by System ID, a list of the steel service line or other distribution facilities replaced during the prior calendar year; and

(2) the operator's proposed work plan for removal or replacement for the current calendar year, the implementation of which is subject to review and amendment by the Pipeline Safety Division. Each operator must notify the Pipeline Safety Division of any revisions to the proposed work plan and, if requested, provide justification for such revision. Within 45 days after receipt of an operator's work plan, the Pipeline Safety Division will notify the operator either of the acceptance of the plan or of the necessary modifications to the plan.

(j) Each operator of a gas distribution system that is subject to the requirements of §7.310 of this title (relating to System of Accounts) may use the provisions of this subsection to account for the investment and expense incurred by the operator to comply with the requirements of this section.

(1) The operator may:

(A) establish one or more designated regulatory asset accounts in which to record any expenses incurred by the operator in connection with acquisition, installation, or operation (including related depreciation) of facilities that are subject to the requirements of this section;

(B) record in one or more designated plant accounts capital costs incurred by the operator for the installation of facilities that are subject to the requirements of this section;

(C) record interest on the balance in the designated distribution facility replacement accounts based on the pretax cost of capital last approved for the utility by the Commission. The utility's pre-tax cost of capital may be adjusted and applied prospectively if the Commission establishes a new pre-tax cost of capital for the utility in a future proceeding;

(D) reduce balances in the designated distribution facility replacement accounts by the amounts that are included in and

recovered though rates established in a subsequent Statement of Intent filing or other rate adjustment mechanism; and

(E) use the presumption set forth in §7.503 of this title (relating to Evidentiary Treatment of Uncontroverted Books and Records of Gas Utilities) with respect to investment and expense incurred by a gas utility for distribution facilities replacement made pursuant to this section.

(2) This subsection does not render any final determination of the reasonableness or necessity of any investment or expense.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005104
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 475-1295

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING
SUBCHAPTER A. APPLICATION PROCEDURES

16 TAC §33.8

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Alcoholic Beverage Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §33.8, On-Premises Application Notification.

Section 33.8 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission believes the policy expressed in the rule should be updated, and chooses to address these issues in proposed new §33.13, Process to Apply for License or Permit. Therefore, the commission has determined that §33.8 should be repealed.

Amy Harrison, Director of the Licensing Division, has determined that for each year of the first five years that the proposed repeal will be in effect, there will be no impact on state or local government.

The proposed repeal will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Ms. Harrison has also determined that for each year of the first five years the proposed repeal will be in effect, the public will benefit because the matters formerly addressed separately in §33.8 will now be addressed as part of a more general rule addressing several matters relating to the application process.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on the repeal may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The proposed repeal is authorized by Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed repeal affects Alcoholic Beverage Code §§5.31, 11.08, 11.391, 61.09 and 61.381, and Government Code §2001.039.

§33.8. On-Premises Application Notification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004981
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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SUBCHAPTER A. APPLICATION PROCEDURES

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of current §33.13, Application for Beer License, and proposes new §33.13, Process to Apply for License or Permit.

Current §33.13 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission has determined that the current rule needs significant changes,

that it should therefore be repealed, and that a new rule should be adopted to replace the repealed rule.

The proposed new section establishes the procedures an applicant must follow to apply for a license or permit from the commission. The section requires completion of a pre-qualification packet before an application for an on-premises location may be filed and sets forth the requirements for a complete pre-qualification packet. The section also clarifies requirements for the posting of notice signs relating to applications for on-premises locations.

Amy Harrison, Director of the Licensing Division, has determined that for each year of the first five years that the proposed repeal and new section will be in effect, there will be no impact on state or local government.

The proposed repeal and new section will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Ms. Harrison has also determined that for each year of the first five years the proposed repeal and new section will be in effect, the public will benefit because the procedures applicants must follow will be clarified, those procedures will utilize commission resources efficiently, and the responsibilities of local officials under the Code will be emphasized and respected. Clarifying these procedures will remove perceived ambiguities that sometimes complicate the process and have led to litigation.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three (3) days prior to the meeting so that appropriate arrangements can be made.

Comments on the repeal of the current section and the proposed new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

16 TAC §33.13

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Alcoholic Beverage Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The proposed repeal is authorized by Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed repeal section affects Alcoholic Beverage Code §§5.31, 11.37, 11.39, 11.391, 61.31, 61.37, 61.39 and 61.381, and Government Code §2001.039.

§33.13. Application for Beer License.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004982
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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16 TAC §33.13

The proposed new section is authorized by Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed new section affects Alcoholic Beverage Code §§5.31, 11.37, 11.39, 11.391, 61.31, 61.37, 61.39 and 61.381, and Government Code §2001.039.

§33.13. Process to Apply for License or Permit.

(a) This section relates to any license or permit. The purpose of this section is to clarify the pre-qualification process in subsection (b) of this section and distinguish it from the application process described in subsections (c) and (d) of this section.

(b) Before an application for a license or permit that is required to be certified under §11.37 or §61.37 of the Alcoholic Beverage Code may be filed with the commission, a pre-qualification packet must be completed. A pre-qualification packet is deemed incomplete if it does not contain all required certifications applicable to the type of license or permit sought and for the location requested, and a response to each item requested by the commission in the packet. For purposes of this section, a completed pre-qualification packet is one that contains:

(1) all required certifications signed by the city secretary, where appropriate, and the county clerk that the location for which the license or permit is sought is in a "wet" area for such license or permit and is not prohibited by charter, by ordinance, or by valid order in reference to the sale of any alcoholic beverage allowed by the license or permit;

(2) all other applicable certifications signed by the city secretary, where appropriate, and the county clerk that are in the pre-qualification packet prescribed by the commission;

(3) the required certification by the Comptroller of Public Accounts that the person submitting the packet holds, or has applied for and satisfies all legal requirements for, the issuance of a sales tax permit;

(4) proof of publication of notice of the application, if required by §11.39 of the Alcoholic Beverage Code; and

(5) a response to each item requested by the commission in the packet.

(c) A person or entity may file an application with the commission by submitting all forms, documents and information prescribed

by the commission in accordance with the practices, policies, and standards relating to the processing of applications for licenses and permits. If a prequalification packet is required by subsection (b) of this section, the packet must be completed before an application is filed. The commission shall process the application to determine whether the application is in compliance with all provisions of the Alcoholic Beverage Code and rules of the commission or whether there is legal reason to deny the application.

(d) On completion of its processing pursuant to subsection (c) of this section, the commission shall inform the applicant that the application:

(1) may be filed with the county judge as mandated by §61.31 of the Alcoholic Beverage Code;

(2) has been referred to the State Office of Administrative Hearings;

(3) is granted; or

(4) is refused.

(e) For purposes of §11.391 and §61.381 of the Alcoholic Beverage Code, a notice sign must be posted for 60 days prior to filing an application pursuant to subsection (c) of this section. For purposes of this subsection, an application is filed on the date a completed application packet is received by the commission.

(f) A notice sign is required for purposes of §11.391 and §61.381 of the Alcoholic Beverage Code unless a license or permit authorizing the on-premises consumption of alcoholic beverages has been active at the requested location any time during the 24 months immediately preceding the filing of the application.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004983
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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CHAPTER 45. MARKETING PRACTICES
SUBCHAPTER D. ADVERTISING AND PROMOTION--ALL BEVERAGES

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of current §45.105, Outdoor Advertising by Mixed Beverage Establishments, and proposes new §45.105, Advertising.

Current §45.105 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission has determined that the current rule should be amended for clarification and to consolidate the commission's policies regarding other forms of advertising, that it should therefore be repealed, and that a new rule should be adopted to replace the repealed rule.

The proposed new section addresses price display at mixed beverage establishments, advertising by private clubs, obligations of retailers using internet advertising, mobile advertising on vehicles, and advertising in and on public vehicle conveyances for hire.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed repeal and new section will be in effect, there will be no impact on state or local government.

The proposed repeal and new section will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years that the proposed repeal and new section will be in effect, the public will benefit because restrictions on alcoholic beverage advertising practices will be clarified.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed repeal and new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

16 TAC §45.105

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Alcoholic Beverage Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The proposed repeal is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.07, which requires the commission to promulgate reasonable rules relating to advertising of mixed beverage establishments, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed repeal affects Alcoholic Beverage Code §§5.31, 32.01, 102.07, 102.15, 108.07, 108.51, 108.52, 108.54 and 108.56, and Government Code §2001.039.

§45.105. Outdoor Advertising by Mixed Beverage Establishments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004985
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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16 TAC §45.105

The proposed new section is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.07, which requires the commission to promulgate reasonable rules relating to advertising of mixed beverage establishments, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed new section affects Alcoholic Beverage Code §§5.31, 32.01, 102.07, 102.15, 108.07, 108.51, 108.52, 108.54 and 108.56, and Government Code §2001.039.

§45.105. Advertising.

(a) Mixed Beverage Establishments.

(1) This subsection relates to Alcoholic Beverage Code §108.07.

(2) Except as provided in this paragraph, the holder of any permit allowing the sale or service of mixed beverages may not advertise any price for an alcoholic beverage on any sign, billboard, marquee, or other display located on the licensed premises in such a manner that the price may be read by persons outside of the premises. It is an exception to the restriction in this paragraph if the holder of a food and beverage certificate places a menu on the exterior wall of the premises so that it can be read outside of the premises only by a pedestrian in close proximity to the menu. In order to qualify for the exception granted in this paragraph, the menu visible outside of the premises must be of the same size and in the same sized font as the menu presented to the establishment's customers, and must show both food and beverage prices.

(b) Private Clubs.

(1) This subsection relates to Alcoholic Beverage Code §§32.01(b), 108.51, 108.52 and 108.56.

(2) The holder of a private club registration permit or a private club exemption certificate must, in any advertising either directly or indirectly advertising the service of alcoholic beverages, whether or not by any specific brand name, state that the service of alcoholic beverages is only for persons who are members of the club.

(3) The holder of a private club registration permit or a private club exemption certificate may advertise any class of alcoholic beverages in an area where the sale of that class of alcoholic beverages is legal for on-premises consumption, provided no other provisions of the Alcoholic Beverage Code are violated.

(c) Mobile Advertising.

(1) This subsection relates to Alcoholic Beverage Code §§108.51, 108.52 and 108.54.

(2) Mobile advertising on vehicles is not permitted unless it meets the definition of an "electric sign" in Alcoholic Beverage Code §108.51(3).

(3) Mobile advertising that meets the definition of an "electric sign" in Alcoholic Beverage Code §105.51(3) and that is funded directly or indirectly by upper-tier members may not be parked within 200 feet of a retail location for more than one hour, in order to prevent benefit to the retailer by drawing consumer traffic to the location.

(4) Mobile advertising that meets the definition of an "electric sign" in Alcoholic Beverage Code §108.51(3) may not be parked, maintained in, or driven through an area or zone where the sale of alcoholic beverages is prohibited.

(d) Internet Advertising.

(1) This subsection relates to Alcoholic Beverage Code §§102.07, 102.15 and 108.07.

(2) Retailers may advertise on the internet via their website or through third party advertising, unless the advertising is funded directly or indirectly by an upper-tier member.

(3) All retailer advertising on the internet must conform with the on-premises promotion restrictions of §45.103 of this subchapter, coupon and inducement restrictions of §45.101 of this subchapter, and sweepstakes and giveaway restrictions of §45.106 of this subchapter.

(e) Public Vehicle Conveyance for Hire.

(1) This subsection relates to Alcoholic Beverage Code §108.51.

(2) For purposes of this subsection, "public vehicle conveyance for hire" includes taxi cabs, public transportation, pedicabs, rickshaws, and any other means of transportation available to the public for which a charge is made.

(3) No member of the alcoholic beverage industry may advertise alcoholic beverages or the sale thereof on the outside of a public vehicle conveyance for hire.

(4) Advertising of alcoholic beverages on the inside of a public vehicle conveyance for hire must not be displayed in such a manner that it may be read by persons outside of the vehicle.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004986
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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16 TAC §45.107

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Alcoholic Beverage Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of current §45.107, Advertising of Alcoholic Beverages by Private Clubs.

Section 45.107 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission believes that another issue related to advertising of alcoholic beverages by private clubs should be addressed, and believes it is appropriate to consolidate these issues in proposed new §45.105, relating to Advertising. Therefore, the commission has determined that current §45.107 should be repealed.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed repeal will be in effect, there will be no impact on state or local government.

The proposed repeal will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years that the proposed repeal will be in effect, the public will benefit because issues related to private club advertising will be clarified and consolidated within a broader proposed new §45.105, relating to Advertising.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed repeal may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The proposed repeal is authorized by Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed repeal affects Alcoholic Beverage Code §5.31 and §32.01, and Government Code §2001.039.

§45.107. Advertising of Alcoholic Beverages by Private Clubs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004987
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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16 TAC §45.107

The Texas Alcoholic Beverage Commission (commission) proposes new §45.107, Alcoholic Beverages Utilized for Cooking Purposes at On-Premises Locations. The commission is separately but simultaneously proposing the repeal of current §45.107, Advertising of Alcoholic Beverages by Private Clubs.

Alcoholic Beverage Code §25.09 and §28.06 authorize the commission to allow certain on-premises permittees to possess and use certain alcoholic beverages for cooking purposes that they are not allowed to sell. Proposed new §45.107 implements these provisions of the Alcoholic Beverage Code by setting forth safeguards to assure that products for sale and products for cooking only are separately maintained.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that proposed new section will be in effect, there will be no impact on state or local government.

The proposed new section will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years that the proposed new section will be in effect, the public will benefit because permittees will have a clearer understanding of how to lawfully use alcoholic beverages for cooking purposes that they could not otherwise possess on premises. The permittee's patrons will benefit by having access to a wider variety of cooked dishes.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on proposed new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The proposed new section is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Alcoholic Beverage Code §25.09 and §28.06, which authorize the commission to adopt rules on the use of certain alcoholic beverages for cooking purposes only.

The proposed new section affects Alcoholic Beverage Code §§5.31, 25.09 and 28.06.

§45.107. Alcoholic Beverages Utilized for Cooking Purposes at On-Premise Locations.

(a) Wine and Beer On-Premises Retailers.

(1) This subsection is promulgated pursuant to Alcoholic Beverage Code §25.09.

(2) Any alcoholic beverage that is in excess of 17 percent alcohol by volume and is used by wine and beer on-premises retailers for cooking purposes must be individually labeled as "For Cooking Use Only".

(3) All alcoholic beverages in excess of 17 percent alcohol by volume used by wine and beer on-premises retailers for cooking purposes must be stored separately from alcoholic beverages that are legal for sale on the premises by such retailers.

(4) No alcoholic beverage in excess of 17 percent alcohol by volume that is designated by wine and beer on-premises retailers for cooking purposes may be sold, served or consumed in liquid form by staff or customers of the retailer.

(5) All receipts for the purchase by wine and beer on-premises retailers of alcoholic beverages in excess of 17 percent alcohol by volume must be retained on the premises until the bottle is empty and disposed of.

(b) Mixed Beverage Permittees.

(1) This subsection is promulgated pursuant to Alcoholic Beverage Code §28.06.

(2) Alcoholic beverages used for cooking purposes may be purchased from, tax stamped by and invoiced by a Local Distributor's Permittee or may be purchased at retail from a licensed retailer. Alcoholic beverages purchased at retail without a tax stamp may not be served or sold in liquid form.

(3) An alcoholic beverage purchased for cooking purposes at retail without a tax stamp must be individually labeled as "For Cooking Use Only".

(4) All alcoholic beverages purchased for cooking purposes at retail without a tax stamp must be stored separately from alcoholic beverages purchased from, tax stamped by and invoiced by a Local Distributor's Permittee.

(5) Alcoholic beverages purchased for cooking purposes at retail without a tax stamp may not be sold, served or consumed in liquid form by staff or customers.

(6) All receipts for the purchase of alcoholic beverages purchased for cooking purposes at retail without a tax stamp must be retained on the premises until the bottle is empty and disposed of.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004988

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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16 TAC §45.108

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Alcoholic Beverage Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §45.108, Restrictions to the Use of Brand Names and Insignia by Industry.

Section 45.108 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission believes that issues regarding the use of brand names and insignia currently addressed in §45.108 should be consolidated with similar issues in §45.112, which is being amended in a separate but simultaneous proceeding. Therefore, the commission has determined that §45.108 should be repealed.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed repeal will be in effect, there will be no impact on state or local government.

The proposed repeal will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years that the proposed repeal will be in effect, the public will benefit because issues related to use of brand names and insignia will be clarified and consolidated within a broader amended §45.112, relating to Use of Brand Names and Insignia Restricted.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed repeal may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp.

Comments will be accepted for 30 days following publication in the *Texas Register.*

The proposed repeal is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.03, which authorizes the commission to adopt rules relating to alcoholic beverage advertising, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed repeal affects Alcoholic Beverage Code §§5.31, 102.07 and 108.03, and Government Code §2001.039.

§45.108. Restrictions to the Use of Brand Names and Insignia by Industry.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

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Alan Steen
Administrator
Texas Alcoholic Beverage Commission
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For further information, please call: (512) 206-3491

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16 TAC §45.112

The Texas Alcoholic Beverage Commission (commission) proposes an amendment to §45.112, Use of Brand Names and Insignia Restricted.

Section 45.112 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. In a separate but simultaneous proceeding, §45.108, Restrictions to the Use of Brand Names and Insignia by Industry, was similarly reviewed under Government Code §2001.039. The commission in that proceeding has determined that the reasons for adopting §45.108 continue to exist, but that it should be repealed and the matters formerly addressed in §45.108 should now be addressed in §45.112.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no impact on state or local government.

The proposed amendment will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years that the proposed amendment will be in effect, the public will benefit because restrictions on the use of brand names and insignia will be clarified and addressed in one rule.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed amendment may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The proposed amendment is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.03, which authorizes the commission to adopt rules relating to alcoholic beverage advertising, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed amendment affects Alcoholic Beverage Code §§5.31, 102.07 and 108.03, and Government Code §2001.039.

§45.112. Use of Brand Names and Insignia by Industry [~~Restricted~~].

(a) This section is promulgated pursuant to [~~the~~] Alcoholic Beverage Code, §102.07 and §108.03.

(b) Advertising of an alcoholic beverage on caps, regalia or uniforms worn by an employee of a manufacturer, distributor, distiller or winery, shall be limited to:

(1) the name and address of the manufacturer, distributor, distiller or winery; and

(2) the brand names, logos and slogans that appear on the container labels approved by the administrator for such alcoholic beverage.

(c) Advertising of an alcoholic beverage on caps, regalia or uniforms worn by a participant in any game, sport, athletic contest or revue, when the participant is sponsored by a manufacturer, distributor, distiller or winery, shall be limited to:

(1) the name and address of the manufacturer, distributor, distiller or winery; and

(2) the brand names, logos and slogans that appear on the container labels approved by the administrator for such alcoholic beverage.

(d) [~~(b)~~] Business cards and stationery bearing brand insignia may be used by licensees and permittees who are not [~~holders of licenses and permits, except holders of~~] retail licensees [~~licenses~~] and permittees [~~permits~~]. Such business cards and stationery may contain:

(1) the name and address of the user;[~~,~~]

(2) the name and address of the firm represented;[~~,~~]

(3) the brand insignia of any alcoholic beverage which the firm represented or the user is licensed to sell;[~~,~~] and

(4) any other logo, slogan or trademark that [~~which~~] appears on the approved label for [~~on~~] such alcoholic beverage, or which slogan or trademark has otherwise been approved by the administrator.

[(c) Menu cards, folders, or sheets advertising beer, ale, or malt liquor may be furnished to holders of retail licenses and permits by other license and permit holders, but such menu cards, folders, or sheets, at the time of their delivery to the retailer, shall be entirely blank as to any listing of food or drink items sold or offered for sale by the retailer. The cost of listings on the menu cards, folders, or sheets, food and drink items offered for sale by the retailer shall not be borne by any license or permit holder who is authorized by the code to sell beer, ale, or malt liquor to holders of retail licenses and permits.]

(e) [(d)] Advertising of alcoholic beverages on the equipment, service or delivery vehicles of a member of the manufacturing or wholesale tiers shall be limited to the brand names or logos [insignia] of the alcoholic beverages sold or represented by the manufacturer, local distributor or wholesaler, firm names and addresses of the manufacturer, local distributor or wholesaler, [owners of the vehicles or equipment] and such slogans as have been approved by the administrator.

(f) A retail employee may not purchase from an upper-tier member any cap, regalia or uniform that advertises an alcoholic beverage, nor may an upper-tier member provide such material to a retail employee with or without charge. A retail employee may wear a cap, regalia or uniform that advertises an alcoholic beverage, but must obtain these items from a source that is not an upper-tier member.

(g) Menu cards, folders or sheets advertising beer, ale or malt liquor may be furnished to a holder of a retail license or permit by an upper-tier member, if such menu cards, folders or sheets, at the time of their delivery to the retailer, do not list any food or drink item offered for sale by the retailer. The holder of the retail license or permit shall bear all costs of listing any such food or drink item on the menu cards, folders or sheets.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Alan Steen
Administrator
Texas Alcoholic Beverage Commission
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16 TAC §45.120

The Texas Alcoholic Beverage Commission (commission) proposes an amendment to §45.120, Co-packaging of Liquor.

Section 45.120 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist, but that the rule should be amended.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no impact on state or local government.

The proposed amendment will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years that the proposed amendment will be in effect, the public will benefit because statutory restrictions regarding co-packaging of liquor will be clarified.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed amendment may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The proposed amendment is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed amendment affects Alcoholic Beverage Code §5.31 and §102.07, and Government Code §2001.039.

§45.120. Co-packaging of Liquor.

(a) This section relates to ["Co-packs" are defined by Texas] Alcoholic Beverage Code[,] §102.07(a)(5).[, as those]

(b) As used in this section:

(1) "Co-pack" means a package:

(A) originally bundled and supplied by a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery or wine bottler (or an agent, employee or servant of such);

(B) containing an alcoholic beverage and another item; [beverages packaged in combination with other items if]

(C) where the package is designed to be delivered intact to the ultimate consumer; and

(D) where the additional items have no value or benefit to the retailer other than that of having the potential of attracting purchases and promoting sales.

(2) "Naked bottle" means an alcoholic beverage sold by a wholesaler that is similar in all regards to the alcoholic beverage contained in a co-pack sold by that wholesaler, except that it is not packaged with any other item.

(c) [(b)] If any alcoholic beverage is sold by a wholesaler as a ["]co-pack["], a [no] retailer may not separate any [the other packaged] item from the package and may not sell it in [by] any way [other means]

other than as [~~the way~~] it was originally packaged when received by the retailer.

(d) In order to demonstrate that a non-alcoholic beverage item in a co-pack has no unlawful value or benefit to the retailer, a retailer must price and sell a co-pack at a cost/price differential not to exceed the cost/price differential at which the retailer prices and sells a naked bottle received from the same wholesaler.

(e) Nothing in this section shall preclude a supplier from differentiating in the price of a naked bottle and co-pack during the packaging phase of a co-pack by adding cost to the co-pack and increasing the baseline price of the co-pack offered to wholesalers.

(f) A retailer may not be forced, induced or persuaded to purchase a prescribed number of co-packs in order to purchase naked bottles, nor may a retailer be forced, induced or persuaded to purchase a prescribed number of naked bottles in order to purchase co-packs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Alan Steen
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SUBCHAPTER E. REGULATION OF CREDIT TRANSACTIONS

DIVISION 1. DELINQUENT LIST

16 TAC §45.121

The Texas Alcoholic Beverage Commission (commission) proposes an amendment to §45.121, Credit Restrictions and Delinquent List for Liquor. The amendment changes the publication dates for the commission's Delinquent List.

In adopting this section in 2009, the commission indicated that it would periodically review it and shorten the time allowed from the end of the reporting period to the date of publication of the Delinquent List. The effect of the proposed amendment is to give delinquent retailers two fewer days to pay a delinquent bill before their names appear on the Delinquent List. When a retailer's name appears on the Delinquent List, all wholesalers are on notice that they may not sell any liquor to that retailer until the delinquent account is paid in full, pursuant to Alcoholic Beverage Code §102.32(d).

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no impact on state or local government.

There will be no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years the proposed amendment is in effect, the public will benefit from adoption of the amendment because the regulatory scheme established in the Code to encourage prompt payment of bills will be further promoted. This regulatory scheme is designed to protect the three-tier system, whereby the interests of retailers and wholesalers are distinguished and protected.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three (3) days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed amendment may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.* Comments are specifically invited on whether the reasons for adopting the rule continue to exist.

The proposed amendment is authorized by Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Texas Alcoholic Beverage Code §102.32(f), which authorizes the commission to adopt rules to give effect to that section of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed amendment affects Alcoholic Beverage Code §5.31 and §102.32, and Government Code §2001.039.

§45.121. Credit Restrictions and Delinquent List for Liquor.

(a) Purpose. This rule implements §§102.32, 11.61(b)(2), and 11.66 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Alcoholic beverage--As used in this section includes only liquor, as that term is defined in §1.04 of the Code.

(2) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(3) Delinquent payment--A financial transaction or instrument that fails to provide payment in full or is returned to the Seller as unpaid for any reason, on or before the day it is required to be paid by §102.32(c) of the Code.

(4) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in a Retailer making one or more delinquent payments to one or more Sellers.

(5) Incident--A single delinquent payment.

(6) Retailer--A package store permittee, wine only package store permittee, private club permittee, private club exemption certificate permittee, mixed beverage permittee, or other retailer, and their

agents, servants and employees. For purposes of this section, a winery permittee, and its agents, servants and employees, is a retailer as to any alcoholic beverage purchased from a seller for resale to ultimate consumers.

(7) Seller--A wholesaler, class B wholesaler, winery, wine bottler, or local distributor and their agents, servants and employees.

(c) Invoices. A delivery of alcoholic beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the alcoholic beverages, the price and terms of sale, and the place and date of delivery.

(1) The Seller's copy of the invoice must be signed by the Retailer to verify receipt of alcoholic beverages and accuracy of invoice.

(2) The Seller and Retailer must retain invoices in compliance with the requirements of §206.01 of the Code.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise.

(d) Delinquent Payment Violation. A Retailer who makes a delinquent payment to a Seller for the delivery of alcoholic beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay a delinquent amount, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) A Retailer whose permit or license expires or is cancelled for cause, voluntarily cancelled[~~, expires~~], suspended or placed in suspension while on the delinquent list will be disqualified from applying for or being issued an original or renewal permit or license until all delinquent payments are satisfied. For purposes of this section, the Retailer includes all persons who were owners, officers, directors and shareholders of the Retailer at the time the delinquency occurred.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation or payment must be submitted electronically to the commission on the commission's web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission's web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations or payment under this subsection must be made to the commission on or before the date the delinquent list is published.

(4) A Seller who fails to report a violation or a payment as required by this subsection is in violation of this section.

(f) Prohibited Sales and Delivery.

(1) Sellers are prohibited from selling or delivering alcoholic beverages to any licensed location of a Retailer who appears on the commission's Delinquent List from the date the violation appears on the Delinquent List until the Release Date on the Delinquent List, or until the Retailer no longer appears on the Delinquent List.

(2) A sale or delivery of alcoholic beverages prohibited by this section is a violation of this section.

(g) Prohibited Purchase or Acceptance.

(1) A Retailer who violates subsection (d) of this section is prohibited from purchasing or accepting delivery of alcoholic beverages from any source at [~~to~~] any of Retailer's licensed locations from the date any violation occurs until all delinquent payment are paid in full.

(2) A prohibited purchase or acceptance of a delivery of alcoholic beverages is a violation of this section.

(h) Exception. A Retailer who wishes to dispute a violation of this section or inclusion on the commission's Delinquent List, based on a good faith dispute between the Retailer and the Seller may submit a detailed electronic or paper written statement with the commission with an electronic or paper copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing:

(i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid, or

(ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

[~~(D) bank statement or records showing the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.~~]

(2) A disputed delinquent payment will not be removed from the delinquent list until documents and/or other records tending to support the Retailer's dispute are submitted to the commission.

(3) The Retailer must immediately submit an electronic notice of resolution of a dispute to the commission under this subsection.

(i) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §11.61(b)(2) of the Code for one or more violations of this section. The commission may consider whether the violation(s) is/are the result of an event or incident when initiating an action under this subsection.

(j) Delinquent List.

(1) The Delinquent List is published bi-monthly on the commission's public web site at http://www.tabc.state.tx.us. An interested person may receive the Delinquent List by electronic mail each date the Delinquent List is published by registering for this service online.

(2) The Delinquent List will be published the 3rd [~~5th~~] day of the month for purchases made from the 1st to the 15th day of the preceding month, for which payment was not made on or before the 25th day of the preceding month. The Delinquent List will be published the 18th [~~20th~~] day of the month for purchases made between the 16th and the last day of the preceding month for which payment was not made on or before the 10th day of the month.

(3) The Delinquent List is effective at 12:01 A.M. on the date of publication.

(4) The Delinquent List is updated hourly to reflect reports of payments submitted.

(k) Calculation of Time. A due date under this section or §102.32(c) of the Code or the publication date of the Delinquent List that would otherwise fall on a Saturday, Sunday or a state or federal holiday, will be the next regular business day. A payment sent by U.S. postal service or other mail delivery service is deemed made on the date postmarked or proof of date delivered to the mail delivery service. A payment hand delivered to an individual authorized to accept payment on behalf of the Seller is deemed made when the authorized individual takes possession of the payment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

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Alan Steen
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Texas Alcoholic Beverage Commission
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DIVISION 2. CASH LAW

16 TAC §45.131

The Texas Alcoholic Beverage Commission (commission) proposes an amendment to §45.131, Payment Regulation for Malt Beverages. The proposed amendment clarifies that the commission can seek sanctions after a single violation of the section.

The effect of the proposed amendment is to remove language in the current section that appears to restrict the commission's enforcement authority.

Dexter K. Jones, Director of the Compliance and Marketing Practices Division, has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no impact on state or local government.

There will be no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Jones has also determined that for each year of the first five years the proposed amendment is in effect, the public will benefit from adoption of the amendment because the regulatory scheme established in the Code to encourage prompt payment of bills will be further promoted. This regulatory scheme is designed to protect the three-tier system, whereby the interests of retailers and wholesalers are distinguished and protected.

The staff of the commission will hold a public hearing to receive oral comments on September 29, 2010 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 9:30 a.m. Open discussion will not be permitted and staff will not respond to comments at the public hearing. The commission's response to comments received at the public hearing will be in the adoption preamble. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three (3) days prior to the meeting so that appropriate arrangements can be made.

Comments on the proposed amendment may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.* Comments are specifically invited on whether the reasons for adopting the rule continue to exist.

The proposed amendment is authorized by Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Texas Alcoholic Beverage Code §102.31(e), which authorizes the commission to adopt rules to give effect to that section of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The proposed amendment affects Alcoholic Beverage Code §5.31 and §102.31, and Government Code §2001.039.

§45.131. Payment Regulations for Malt Beverages.

(a) Purpose. This rule implements §§102.31, 11.61(b)(2), 11.66[~~, 28.12~~], 61.72 and 61.73 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(2) Cash payment--United States Currency and coins, or a cash equivalent financial transaction or instrument.

(3) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in one or more incidents to one or more Sellers.

(4) Incident--One financial transaction or instrument made by a Retailer that fails to provide payment in full for malt beverages delivered by a Seller to the Retailer.

(5) Malt beverages--Ale or malt liquor containing more than four percent of alcohol by weight and beer containing one-half of one percent or more of alcohol by volume and not more than four percent alcohol by weight.

(6) Retailer--A license or permit holder and their agents, servants and employees, authorized to sell malt beverages for on or off premise [~~off-premise~~] consumption to an ultimate consumer.

(7) Seller--A general, local or branch distributor's [~~distributor~~] license holder, or a local distributor's permit holder and their agents, servants, employees, or a subsidiary or affiliate, authorized to sell malt beverages to a retailer.

(c) Invoices. A delivery of malt beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the malt beverages, the price, the place and date of delivery.

(1) The Seller's copy of the invoice must be signed by the Retailer to verify receipt of malt beverages and accuracy of invoice and by the Seller to acknowledge payment was received on or before the delivery.

(2) The Seller and Retailer must retain invoices for four years from the date of delivery.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise, as long as the records can be accessed from the licensed premise and made available to the commission during normal business hours.

(d) Cash Payment Violation. A Retailer who fails to make a cash payment to a Seller for the delivery of malt beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay the amount due, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) For purposes of this section, the Retailer includes all persons who are or were owners, officers, directors, managers or shareholders of the Retailer at the time a cash payment violation occurs.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation must be submitted electronically on the forms provided on the commission's web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission's web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations under this subsection must be made to the commission within two business days from the date the violation is discovered by the Seller.

(4) A Seller who fails to report a violation as required by this subsection is in violation of this section.

(f) Exception. A Retailer who wishes to dispute a violation of this section, based on a good faith dispute between the Retailer and the Seller may submit supporting documents and a detailed written statement to the commission with a copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing:

(i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid; or

(ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

[~~(D) bank statement or records showing the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.~~]

(2) The Retailer must immediately submit a notice of resolution of a dispute to the commission under this subsection.

(g) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §§11.61, 28.12, 61.71, 61.73 or 61.74 of the Code for one or more [~~repeat~~] violations of this section. The commission may consider whether a violation is [~~the repeat violations are~~] the result of an event or incident when initiating an action under this subsection.

(h) Calculation of Time. Sundays and legal holidays are not counted in determining time periods under this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004993
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 206-3491

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 101. DENTAL LICENSURE

22 TAC §101.1

The State Board of Dental Examiners (Board) proposes an amendment to §101.1, relating to General Qualifications for Licensure. The amendment was suggested by staff and proposed by the Board to provide clarification regarding application evaluation for potential licensees.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be clarification for potential dental licensees regarding application evaluation. At its April 16, 2010 Board meeting, the Board voted to adopt rules implementing a formal process to provide potential license and registration applicants a Criminal History Evaluation Letter. This amendment adds the option of a Criminal History Evaluation letter in §101.1(f) to the options already provided to a potential dental applicant in the event that the individual is uncertain whether or not he or she is qualified by rule or law for licensure.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe

Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that the section is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§101.1. General Qualifications for Licensure.

(a) - (e) (No change.)

(f) In the event a potential [~~an~~] applicant is uncertain whether he or she is qualified according to rule and law for licensure as a dentist, prior to taking the clinical examination, a written request may be submitted by the potential applicant with all proof required other than clinical examination scores. The Board will review the information and advise the applicant whether he or she is qualified for licensure pending successful completion of the clinical examination. The qualifying clinical examination must be taken within one year of the date of being so advised by the Board. A potential applicant who believes that his or her criminal history may disqualify him or her from licensure may request a Criminal History Evaluation Letter in accordance with §101.9 of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004996
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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22 TAC §101.2

The State Board of Dental Examiners (Board) proposes an amendment to §101.2, relating to Licensure by Examination. The amendment is the result of action by the Board adding the Council of Interstate Testing Agencies (CITA) as a designated regional examining board.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be an increased pool of approved examining boards for applicants. At the April 16, 2010 Board meeting, the Board voted to approve the Council of Interstate Testing Agencies (CITA) as a designated regional examining board for dental and dental hygiene license applicants. The proposed amendment incorporates this change as it relates to dentists into §101.2(d)(1)(E). The amended section permits dental applicants to submit qualifying scores from CITA with testing dates as early as January 1, 2009.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that the section is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§101.2. Licensure by Examination.

(a) - (c) (No change.)

(d) Designated regional examining boards.

(1) The following regional examining boards have been designated as acceptable by the SBDE as of the effective dates shown:

(A) Western Regional Examining Board, January 1, 1994;

(B) Central Regional Dental Testing Service, January 1, 2002;

(C) Northeast Regional Board, January 1, 2005;

(D) Southern Regional Testing Agency, January 1, 2005; and,

(E) Council of Interstate Testing Agencies (CITA), January 1, 2009.

(2) Examination results will be accepted for five years from the date of the examination.

(3) Only results from examinations taken after the indicated acceptance date will be accepted.

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004998
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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22 TAC §101.3

The State Board of Dental Examiners (Board) proposes an amendment to §101.3, relating to Licensure by Credentials. The amendment was suggested by staff and proposed by the Board to ensure accuracy in the agency's rules.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be accuracy in the agency's rules. The American

Association of Dental Examiners (AADE) has changed its name to the American Association of Dental Boards (AADB). The proposed amendment is a housekeeping change to §101.3(a)(8) reflecting the change.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that the section is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§101.3. Licensure by Credentials.

(a) In addition to the general qualifications for licensure contained in §101.1 of this chapter, an applicant for licensure by credentials must present proof that the applicant:

(1) - (7) (No change.)

(8) Has successfully passed background checks for criminal or fraudulent activities, to include information from: the National Practitioner Data Bank, the Healthcare Integrity and Protection Data Bank and/or the American Association of Dental Boards (AADB) [~~AADE~~] Clearinghouse for Disciplinary Action. For applications filed after August 31, 2002, an applicant shall make application with the Professional Background Information Services (PBIS), requesting Level II verification, paying the required fees, and requesting verification be sent to the Board for determination of successful background verification;

(9) - (10) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201005000
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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22 TAC §101.4

The State Board of Dental Examiners (Board) proposes an amendment to §101.4, relating to Temporary Licensure by Credentials. The amendment was suggested by staff and proposed by the Board to ensure accuracy in the agency's rules.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be accuracy in the agency's rules. The American Association of Dental Examiners (AADE) has changed its name to the American Association of Dental Boards (AADB). The proposed amendment is a housekeeping change to §101.4(a)(8) reflecting the change.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that the section is published in the *Texas Register*.

The amendment is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§101.4. Temporary Licensure by Credentials.

(a) In addition to the general qualifications for licensure contained in §101.1 of this chapter, an applicant for temporary licensure by credentials must present proof that the applicant:

(1) - (7) (No change.)

(8) Has successfully passed background checks for criminal or fraudulent activities, to include information from the National Practitioner Data Bank, the Healthcare Integrity and Protection Data Bank and/or the American Association of Dental Boards (AADB) [~~AADE~~] Clearinghouse for Disciplinary Action;

(9) - (11) (No change.)

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201005001
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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22 TAC §101.8

The State Board of Dental Examiners (Board) proposes amendments to §101.8, relating to Persons with Criminal Backgrounds. The amendments were suggested by staff and proposed by the Board to allow the Board to prohibit dental assistant registration on the same grounds it is permitted to prohibit dental and dental hygiene licensure.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be increased protection of the public. Section 101.8 governs the circumstances in which the Board can take action against an individual's license or registration. Currently the section incorporates statutory limitations on the authority of the Board of revoke, suspend, or deny licenses and registrations found in Texas Occupations Code §§53.021 - 53.023 and Dental Practice Act §263.006. The law and rule apply equally to dentists, dental hygienists, and dental assistants.

Dental Practice Act §263.001 provides additional grounds for the Board to refuse to issue licenses to dental and dental hygiene applicants. The amended section permits the Board to refuse to register a dental assistant applicant for the same reasons.

The amendments also clarify that all aspects of the section apply equally to dentists, dental hygienists, and dental assistants.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering this section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register.*

The amendments are proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Texas Occupations Code §265.001, which provides the Board with the authority to adopt and enforce rules regarding the registration of dental assistants as necessary to protect the public health and safety.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§101.8. Persons with Criminal Backgrounds.

(a) Mandatory Suspension. The Board shall suspend a license/registration on proof that the person has been:

(1) initially convicted of:

(A) a felony;

(B) a misdemeanor under Chapter 22, Penal Code, other than a misdemeanor punishable by fine only;

(C) a misdemeanor on conviction of which a defendant is required to register as a sex offender under Chapter 62, Code of Criminal Procedure;

(D) a misdemeanor under Section 25.07, Penal Code; or

(E) a misdemeanor under Section 25.071, Penal Code; or

(2) subject to an initial finding of guilt by a trier of fact of a felony under:

(A) Chapter 481 or 483, Health and Safety Code;

(B) Section 485.033, Health and Safety Code; or

(C) the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §801 et seq.).

(b) Mandatory Revocation. The Board shall revoke the license/registration of a person:

(1) on final conviction of a person for an offense described under subsection (a) of this section, the Board shall revoke the person's license/registration; or

(2) upon the incarceration of a person pursuant to a conviction of a felony under any state or federal law.

(c) Discretionary Revocation, Suspension, or Denial of License/Registration Application.

(1) The Board may revoke or suspend an existing license/registration because of:

(A) a licensee/registrant's conviction under state or federal law for an offense that directly relates to the practice of dentistry, [~~or~~] dental hygiene, or dental assisting;

(B) a licensee/registrant's conviction under state or federal law of an offense listed in §3g, Article 42.12, Code of Criminal Procedure; or

(C) a licensee/registrant's conviction under state or federal law for a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure.

(2) The Board may deny application for licensure/registration because of:

(A) a person's conviction under state or federal law for an offense that directly relates to the practice of dentistry, [~~or~~] dental hygiene, or dental assisting;

(B) a person's conviction under state or federal law for an offense that does not directly relate to the duties and responsibilities of the practice of dentistry, [~~or~~] dental hygiene, or dental assisting and that was committed less than five years before the date the person applies for the license/registration;

(C) a person's conviction under state or federal law for an offense listed in §3g, Article 42.12, Code of Criminal Procedure; [~~or~~]

(D) a person's conviction under state or federal law for a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure;[~~,~~]

(E) the person presents to the Board fraudulent or false evidence of the person's qualification for license/registration;

(F) the person is guilty of any illegality, fraud, or deception during the process to secure a license/registration;

(G) the person is habitually intoxicated or is addicted to drugs;

(H) the person commits a dishonest or illegal practice in or connected to dentistry, dental hygiene, or dental assisting;

(I) the person is convicted of a felony under a federal law or law of this state; or

(J) the person is found to have violated a law of this state relating to the practice of dentistry, dental hygiene, or dental assisting within the twelve (12) months preceding the date the person filed an application for a license/registration.

(3) In determining whether a criminal conviction directly relates to the practice of dentistry, [or] dental hygiene,or dental assisting, the Board shall consider the factors listed in §53.022, Occupations Code.

(4) Those crimes that the Board considers to be of such serious nature that they relate to fitness to practice a profession, or as directly related to the practice of dentistry, [or] dental hygiene, or dental assisting, include, but are not limited to:

(A) any felony of which fraud, dishonesty, or deceit is an essential element;

(B) any criminal violation of the Dental Practice Act or other statutes regulating or pertaining to the professions of dentistry, [or] dental hygiene, or dental assisting;

(C) any criminal violation of statutes regulating other professions in the healing arts;

(D) homicide;

(E) burglary;

(F) robbery;

(G) sexual assault;

(H) felony theft;

(I) any sexual offense against a child;

(J) felony driving while intoxicated; and

(K) any felony subjecting a defendant to the sex offender registration requirements under Chapter 62, Code of Criminal Procedure.

(5) For purposes of this section, the Board may consider a person to have been "convicted of an offense" regardless of whether the proceedings were dismissed as a part of a deferred adjudication agreement with the court if, after consideration of the factors described by §53.022 and §53.023(a), Occupations Code, the Board determines that:

(A) the person may pose a continued threat to public safety; or

(B) employment of the person in the practice of dentistry, [or] dental hygiene, or dental assisting would create a situation in which the person has an opportunity to repeat the prohibited conduct.

(d) Process for consideration. The Board may consider a person's present fitness for licensure/registration in determining whether a person's conviction of a crime is cause for denial of an application or for disciplinary procedures. In determining a person's present fitness for licensure/registration, the Board shall consider the factors listed in §53.023, Occupations Code.

(1) It shall be the responsibility of the applicant or licensee/registrant to secure and provide to the Board the recommendations from the prosecution, law enforcement, and correctional authorities that prosecuted, arrested or had custodial responsibility for the applicant or licensee/registrant in connection with each and every offense. Failure to provide such recommendations in their entirety is justification to refuse licensing/registration or impose sanctions unless the applicant or licensee/registrant shows good cause for such failure.

(2) The applicant or licensee/registrant shall also furnish proof in such form as may be required by the Board that he or she has maintained a record of steady employment, has supported his or her dependents, has otherwise maintained a record of good conduct, and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which the applicant or licensee/registrant has been convicted.

(e) No person currently serving in prison for conviction of a felony under any state or federal law is eligible to obtain a license to practice dentistry or dental hygiene or registration to practice as a registered dental assistant.

(f) The Board may not reinstate or reissue a license/registration suspended or revoked under subsections (a) or (b) of this section, unless an express determination is made that the reinstatement or reissuance of the license/registration is in the best interests of the public and the person whose license/registration was suspended or revoked.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201005002
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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CHAPTER 103. DENTAL HYGIENE LICENSURE

22 TAC §103.1

The State Board of Dental Examiners (Board) proposes an amendment to §103.1, relating to General Qualifications for Licensure. The amendment was suggested by staff and proposed by the Board to provide clarification regarding application evaluation for potential licensees.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be clarification for potential licensees regarding application evaluation. At its April 16, 2010 Board meeting, the Board voted to adopt rules implementing a formal process to provide potential license and registration applicants a Criminal History Evaluation Letter. The amendment adds the option of a Criminal History Evaluation letter in §103.1(f) to the options already provided to a potential dental hygiene applicant in the event that the individual is uncertain whether or not he or she is qualified by rule or law for licensure.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that the section is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§103.1. General Qualifications for Licensure.

(a) - (e) (No change.)

(f) In the event a potential [~~an~~] applicant is uncertain whether he/she is qualified according to rule and law for licensure as a dental hygienist, prior to taking the clinical examination a written request may be submitted by the potential applicant with all proof required other than clinical examination scores. The SBDE will review the information and advise the applicant whether he or she is qualified for licensure pending successful completion of the clinical examination. The qualifying clinical examination must be taken within one year of the date of being so advised by the SBDE. A potential applicant who believes that his or her criminal history may disqualify him or her from licensure may request a Criminal History Evaluation Letter in accordance with §103.8 of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004997
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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22 TAC §103.2

The State Board of Dental Examiners (Board) proposes an amendment to §103.2, relating to Licensure by Examination. The amendment is the result of action by the Board adding the Council of Interstate Testing Agencies (CITA) as a designated regional examining board.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be an increased pool of approved examining boards for applicants. At the April 16, 2010 Board meeting, the Board voted to approve the Council of Interstate Testing Agencies (CITA) as a designated regional examining board for dental and dental hygiene license applicants. The proposed amendment incorporates the change as it relates to dental hygiene applicants into §103.2(b)(1)(E). The amended section permits dental hygiene applicants to submit qualifying scores from CITA with testing dates as early as January 1, 2009.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that the section is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§103.2. Licensure by Examination.

(a) (No change.)

(b) Designated regional examining boards.

(1) The following regional examining boards have been designated as acceptable by the State Board of Dental Examiners as of the effective dates shown:

(A) Western Regional Examining Board, January 1, 1994;

(B) Central Regional Dental Testing Service, January 1, 2002;

(C) Northeast Regional Board, January 1, 2005;

(D) Southern Regional Testing Agency, January 1, 2005; and,

(E) Council of Interstate Testing Agencies (CITA), January 1, 2009.

(2) Examination results will be accepted for five years from the date of the examination.

(3) Only results from examinations taken after the indicated acceptance date will be accepted.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201004999
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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CHAPTER 108. PROFESSIONAL CONDUCT
SUBCHAPTER E. BUSINESS PROMOTION

22 TAC §108.52

The State Board of Dental Examiners (Board) proposes amendments to §108.52, relating to False or Misleading Communications. The amendments were suggested by staff and proposed by the Board to create more clarification for licensees regarding advertising restrictions.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be specificity in the agency's rules regarding adver-

tising restrictions. Dental Practice Act §259.005 provides a list of restrictions the Board may adopt to regulate advertising by licensees. Most permissible regulations found in this section have been explicitly integrated into the agency's rules in Chapter 108, Subchapter E, Business Promotion. The proposed amendments to §108.52 expands the list of enumerated prohibitions to include (1) failure to disclose in advertisements reasonably predictable fees (i.e., advertising a new patient exam and cleaning without including charges for radiographs) and (2) offering a discount for dental services without disclosing the total fee to which the discount will apply. Currently these two prohibitions fall under the general proscriptions of §108.52(2) which forbid a licensee from omitting necessary facts in communications. The amendments, however, provide greater specificity in the rule for licensees.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering this section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register.*

The amendments are proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Texas Occupations Code §254.002, which provides the Board with the authority to adopt and enforce reasonable restrictions to regulate advertising relating to the practice of dentistry by a person engaged in the practice of dentistry as provided by §259.005.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§108.52. False or Misleading Communications.

A dentist shall not make any false or misleading communications to the public. Examples of communications to the public that may be false or misleading in any material respect include but are not limited to those that:

(1) contain material misrepresentation of fact;

(2) omit a fact necessary to make the statement considered as a whole not materially misleading;

(3) create an unjustified expectation about results the dentist can achieve;

(4) contain a representation or implication that the announced services are superior in quality to those of other dentists which is not subject to reasonable verification by the public;[.]

(5) guarantee that a dental patient will be satisfied with the services and/or products received;[.]

(6) refer to a fee for dental services without disclosing that additional fees may be involved in individual cases, if the possibility of additional fees may be reasonably predicted; or

(7) offer a discount for dental services without disclosing the total fee to which the discount will apply.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201005003
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

22 TAC §114.6

The State Board of Dental Examiners (Board) proposes new §114.6, relating to General Qualifications for Registration or Certification. The new section was suggested by staff and proposed by the Board to create a process for the conditional registration of dental assistants who might otherwise not qualify for registration due to criminal conduct.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing the proposal will be greater protection of the public. Proposed new §114.6 outlines general qualifications for individuals applying for registration or certification as a dental assistant similar to the general qualification sections for dentists, found in §101.1, and for dental hygienists, found in §103.1. In addition, the section outlines the circumstances in which the Board may refuse to issue a dental assistant registration or certification and creates a process the Board may utilize to issue a conditional dental assistant registration or certification in situations where an individual may not qualify to receive an unencumbered dental assistant registration or certification due to criminal conduct.

Ms. Meek has also determined that for each year of the first five years the new section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering this section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register.*

The new section is proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Texas Occupations Code §265.001, which provides the Board with the authority to adopt and enforce rules regarding the registration of dental assistants as necessary to protect the public health and safety.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§114.6. General Qualifications for Registration or Certification.

(a) Any person who desires to provide dental assistant services requiring registration or certification must obtain the proper registration or certification issued by the Board before providing the services, except as provided in Texas Occupations Code §265.005(l) and §114.11 of this chapter.

(b) Any applicant for registration or certification must meet the requirements of this chapter.

(c) To be eligible for registration or certification, an applicant must provide with an application form approved by the Board satisfactory proof to the Board that the applicant:

(1) has fulfilled all requirements for registration or certification outlined in this chapter;

(2) has met the requirements of §101.8 of this title;

(3) has successfully completed a current course in basic life support;

(4) has taken and passed the jurisprudence assessment administered by the Board or an entity designated by the Board within one year immediately prior to application; and,

(5) has paid all application, examination and fees required by law and Board rules and regulations.

(d) Applications for dental assistant registration and certification must be delivered to the office of the State Board of Dental Examiners.

(e) An application for dental assistant registration or certification is filed with the Board when it is actually received, date-stamped, and logged-in by the Board along with all required documentation and fees. An incomplete application will be returned to the applicant with an explanation of additional documentation or information needed.

(f) The Board may refuse to issue registration or certificate to any individual who does not meet the requirements of subsection (c)(2) of this section, who has a pending criminal case, or who has been convicted or received a deferred adjudication in accordance with §101.8 of this title. Alternatively, the Board may choose to issue a conditional registration or certificate to the individual in accordance with this subsection.

(1) At the time the registration or certificate is issued, the individual may be required to enter into an agreed settlement order with the Board.

(2) With respect to any individual who does not meet the requirements of subsection (c)(2) of this section, or who has a pending criminal case or who has been convicted or received a deferred adjudication in accordance with §101.8 of this title, the Board may consider conditional registration or certification of the individual when such registration or certification is not prohibited by law. The Board shall consider the following factors:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a license to engage in the occupation;

(C) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation;

(E) the extent and nature of the person's past criminal activity;

(F) the age of the person when the crime was committed;

(G) the amount of time that has elapsed since the person's last criminal activity;

(H) the conduct and work activity of the person before and after the criminal activity;

(I) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

(J) other evidence of the person's fitness, including letters of recommendation from:

(i) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

(ii) the sheriff or chief of police in the community where the person resides; and

(iii) any other person in contact with the convicted person.

(3) The applicant shall, to the extent possible, obtain and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities. The applicant shall also furnish proof in such form as may be required by the Board that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted or received a deferred order.

(4) The order may include limitations including, but not limited to, practice limitations, stipulations, compliance with court ordered conditions, notification of employer or any other requirements the Board recommends to ensure public safety.

(5) In the event an applicant is uncertain whether he or she is qualified to obtain a dental assistant registration or certification due to criminal conduct, the applicant may request a Criminal History Evaluation Letter in accordance with §114.9 of this chapter, prior to application.

(6) Should the individual violate the terms of his or her conditional registration or certificate, the Board may take additional disciplinary action against the individual.

(g) An applicant whose application is denied by the Board may appeal the decision to the State Office of Administrative Hearings.

(h) An individual whose application for dental assistant registration/certification is denied is not eligible to file another application for registration/certification until the expiration of one year from the date of denial or the date of the Board's order denying the application for registration/certification, whichever date is later.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201005004

Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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22 TAC §114.21

The State Board of Dental Examiners (Board) proposes amendments to §114.21, relating to Requirements for Dental Assistant Registration Courses and Examinations. The amendments were suggested by staff and proposed by the Board to update outdated references in the agency's rules.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be accuracy in the agency's rules. Changes to Chapter 114 have created several outdated references in §114.21. These proposed amendments are housekeeping changes to update the references.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering this section. There is no anticipated economic impact on individuals or small or micro-businesses required to comply with the section as proposed.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§114.21. Requirements for Dental Assistant Registration Courses and Examinations.

(a) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) "Dental industry professional organization"--any organization, the primary mission of which is to represent and support dentists, dental hygienists, and/or dental assistants;

(2) "Dental Assistant Advisory Committee"--a committee consisting of dental professionals and educators, created by the Board under the authority of Tex. Occ. Code §265.005;

(3) "Jurisprudence"--the body of statutes and regulations pertaining to and governing practice by dental assistants, including relevant portions of the Texas Occupations Code, and the rules enacted by the SBDE.

(b) Any school or program accredited by the Commission on Dental Accreditation of the American Dental Association or any dental industry professional organization may offer a course and examination to fulfill the requirements for dental assistant registration outlined in [~~§114.20 of~~] this chapter, so long as the course and examination are compliant with the requirements of this section, and have been approved by the SBDE.

(c) Courses administered to fulfill the requirements of this chapter must:

(1) Cover all the course objectives outlined by the SBDE and the Dental Assistant Advisory Committee and set forth in [~~§114.22 of~~] this chapter; and,

(2) Comply with other requirements established by the SBDE and the Dental Assistant Advisory Committee.

(d) Course providers administering examinations to fulfill the requirements of this chapter must:

(1) Employ a minimum of 50 questions per examination that adequately cover the course objectives identified by the Dental Assistant Advisory Committee and set forth in [~~§114.22 of~~] this chapter;

(2) Establish a minimum passing score of 70%; and,

(3) Maintain safeguards to ensure the integrity and security of the examinations, their content, and the physical examination environment, as outlined in [~~§114.23 of~~] this chapter.

(e) Any course and examination administered under this section may be offered through self-study, interactive computer courses, or lecture courses, and may be offered through the Internet.

(f) Course and examination approval. A provider seeking approval of a dental assistant course must submit the following materials to the SBDE prior to offering the course:

(1) A complete, signed, and notarized Dental Assistant Course Provider Application, as promulgated by the SBDE;

(2) An application fee in the amount established by the SBDE, payable by check or money order made payable to the State Board of Dental Examiners; and

(3) Documentation pertaining to the course, including:

(A) All course materials to be provided to course attendees;

(B) The complete pool of examination questions to be drawn from;

(C) An examination integrity plan that meets the requirements of [~~§114.23 of~~] this chapter;

(D) A copy of the certificate to be issued on course completion; and,

(E) A copy of the provider's reexamination policy, which notifies course attendees in advance how many reexaminations shall be allowed without retaking the course, the cost of reexamination, and other pertinent information.

(g) Following course approval, the following information must be submitted to the SBDE:

(1) An internet URL address for a website containing information about the approved course, or, if no such website exists, contact information for the course provider;

(2) A schedule of courses to be offered, including dates, times and locations for each;

(3) Prompt notification of any changes to the published course schedule; and,

(4) Notification of any substantive changes to the course curriculum or materials following SBDE approval. Such changes must

be submitted in writing to the SBDE for approval prior to their implementation in the course.

(h) The course provider shall provide all course registrants with their examination results within 30 days of completion of the examination.

(i) All course providers are subject to audit by the State Board of Dental Examiners for purposes of ensuring compliance with the requirements of this chapter.

(j) Documentation of course attendance and course completion shall be kept by the course provider for a period of not less than two (2) years.

(k) Failure to comply with any of the requirements of this section may result in withdrawal of course approval.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201005005
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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CHAPTER 116. DENTAL LABORATORIES

22 TAC §116.10

The State Board of Dental Examiners (Board) proposes amendments to §116.10, relating to Prosthetic Identification. The amendments were suggested by the Dental Laboratory Certification Council and proposed by the Board to increase the public's accessibility to information regarding laboratory products.

Ms. Sherri Sanders Meek, Executive Director, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the proposal will be increased protection of the public. At the March 26, 2010 meeting of the Dental Laboratory Certification Council (DLCC), the DLCC voted to recommend the following two rule amendments to the Board in accordance with Dental Practice Act §266.101.

First, the DLCC voted to recommend an amendment to §116.10, that offers guidelines for reporting materials used by labs in the fabrication of lab products. The DLCC members agreed that full disclosure of all materials utilized in the creation of prosthetic devices could be beneficial to dentists and dental patients, but that requiring such disclosure would be cumbersome for lab owners and managers. Ultimately the DLCC voted to recommend permissive language in the amendment. Second, the DLCC voted to suggest an amendment requiring labs to specify the country of origin of all lab products. The proposed amendments to §116.10(f) incorporate both of the recommendations proffered by the DLCC.

Ms. Meek has also determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering this section. There may be some negligible economic costs to individuals, small or micro-businesses as a result of this proposed amendment. Many dental laboratories in the state are small or micro-businesses as defined by Texas Government Code §2006.001. The amendment requires all dental laboratories to provide additional information to dentists and dental patients. However, the required information should be readily available to those required to comply with the amendment and therefore should only create a negligible economic impact, if any. Under Texas Government Code §2006.002, an agency is required to consider alternative regulatory methods only if the alternative methods would be consistent with the health, safety, and environmental and economic welfare of the state. The Board has developed this proposed amendment in the most permissive way possible while still promoting the transfer of information to dentists and dental patients.

Comments on the proposal may be submitted to Carey A. Olney, staff attorney, State Board of Dental Examiners, 333 Guadalupe Street, Tower 3, Suite 800, Austin, Texas 78701 (by mail), (512) 463-7452 (by fax), or *carey.olney@tsbde.state.tx.us* (by email). To be considered, comments must be in writing and received by the State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register.*

The amendments are proposed under Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Texas Occupations Code §266.102, which provides the Board the authority to adopt rules necessary for it to regulate dental laboratories.

The proposal affects Texas Occupations Code, Title 3, Subtitle D and Texas Administrative Code, Title 22, Part 5.

§116.10. Prosthetic Identification.

(a) - (e) (No change.)

(f) A dental laboratory that is required to register with the State Board of Dental Examiners shall clearly label or certify in writing to the prescribing dentist that the prosthesis or appliance being delivered to the prescribing dentist was either:

(1) manufactured entirely by the SBDE registered dental laboratory;

(2) manufactured in part or whole by a domestic laboratory inside of the United States; or,

(3) manufactured in part or whole by a foreign laboratory outside of the United States and clearly identify the country in which the dental laboratory work was performed.

(g) A dental laboratory that is required to register with the State Board of Dental Examiners may return to the dentist who issued the prescription written certification of all materials utilized in the prosthesis or appliance, including the percentage of each ingredient used in the fabrication of the prosthesis or appliance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201005006

Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6400

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.38

The Texas State Board of Examiners of Psychologists proposes amendments to §465.38, concerning Psychological Services for Public Schools. The amendments would provide exemptions to the required one year of supervision after licensure as an LSSP.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700 or email brenda.skiff@tsbep.state.tx.us.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.38. Psychological Services for Public Schools.

This rule acknowledges the unique difference in the delivery of school psychological services in the public schools from psychological services in the private sector. The Board recognizes the purview of the State Board of Education and the Texas Education Agency in safeguarding the rights of public school children in Texas. The mandated multidisciplinary team decision making, hierarchy of supervision, regulatory provisions, and past traditions of school psychological service delivery both nationally and in Texas, among other factors, allow for rules of practice in the public schools which reflect these occupational distinctions from the private practice of psychology.

(1) Definition.

(A) The specialist in school psychology license permits the licensee to provide school psychological services in Texas public schools.

(B) A licensed specialist in school psychology (LSSP) means a person who is trained to address psychological and behavioral problems manifested in and associated with educational systems by utilizing psychological concepts and methods in programs or actions which attempt to improve the learning, adjustment and behavior of students. Such activities include, but are not limited to, addressing special education eligibility, conducting manifestation determinations, and assisting with the development and implementation of individual educational programs.

(C) The assessment of emotional or behavioral disturbance, for educational purposes, using psychological techniques and procedures is considered the practice of psychology.

(2) Titles. The correct title for persons holding this license is Licensed Specialist in School Psychology or LSSP. Only individuals who meet the requirements of §465.6 of this title (relating to Listings, Public Statements and Advertisements, Solicitation, and Specialty Titles) may refer to themselves as School Psychologists. No individual may use the title Licensed School Psychologist.

(3) Providers of School Psychological Services. School psychological services may be provided in Texas public schools only by individuals authorized by this Board to provide such services. Individuals who may provide such school psychological services include LSSPs and interns or trainees as defined in §463.9 of this title (relating to Licensed Specialist in School Psychology). Nothing in this rule prohibits public schools from contracting with licensed psychologists and licensed psychological associates who are not LSSPs to provide psychological services, other than school psychology, in their areas of competency. School districts may contract for specific types of psychological services, such as clinical psychology, counseling psychology, neuropsychology, and family therapy, which are not readily available from the licensed specialist in school psychology employed by the school district. Such contracting must be on a short term or part time basis and cannot involve the broad range of school psychological services listed in paragraph (1)(B) of this section. An LSSP who contracts with a school district to provide school psychological services may not permit an individual who does not hold a valid LSSP license to perform any of the contracted school psychological services.

(4) Supervision.

(A) Direct, systematic, face-to-face supervision must be provided to:

(i) Interns as defined in §463.9 of this title.

(ii) Individuals who meet the training requirements of §463.9 of this title and who have passed the National School Psychology Examination at the Texas cutoff score or above and who have been notified in writing of this status by the Board. These individuals may practice under supervision in a Texas public school district for no more than one calendar year. They must be designated as trainees.

(iii) LSSPs for a period of one academic year following licensure unless the individual also holds licensure as a psychologist in Texas. This supervision may be waived for individuals who legally provided full-time, unsupervised school psychological services in another state for a minimum of three academic years immediately preceding application for licensure in Texas as documented by the public schools where services were provided and who graduated from a training program approved by NASP or accredited in school psychology by APA or who hold NCSP certification.

(iv) LSSPs when the individual is providing psychological services outside his or her area of training and supervised experience.

(B) Nothing in this rule applies to administrative supervision of psychology personnel within Texas public schools, performed by non-psychologists, in job functions involving, but not limited to, attendance, time management, completion of assignments, or adherence to school policies and procedures.

(5) Supervisor Qualifications. Supervision may only be provided by a LSSP, who has a minimum of three years of experience providing psychological services in the public schools of this or another state. To meet supervisor qualifications, a licensee must be able to document the required experience by providing documentation from the authority that regulates the provision of psychological services in the public schools of that state and proof that the licensee provided such services, documented by the public schools in the state in which the services were provided. Any licensed specialist in school psychology may count one full year as an intern or trainee as one of the three years of experience required to perform supervision.

(6) Conflict Between Laws and Board Rules. In the event of a conflict between state or federal statutes and Board rules, state or federal statutes control.

(7) Compliance with Applicable Education Laws. LSSPs shall comply with all applicable state and federal laws affecting the practice of school psychology, including, but not limited to:

(A) Texas Education Code;

(B) Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232q;

(C) Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq;

(D) Texas Public Information Act ("Open Records Act"), Texas Government Code, Chapter 552;

(E) Section 504 of the Rehabilitation Act of 1973.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004933
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 305-7706

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CHAPTER 471. RENEWALS

22 TAC §471.4

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Examiners of Psychologists or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas State Board of Examiners of Psychologists proposes the repeal of §471.4, concerning Guaranteed Student Loan Requirement. The repeal is necessary since the law on which it is based has changed.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the repeal will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed repeal.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700 or email brenda.skiff@tsbep.state.tx.us.

The repeal is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§471.4. Guaranteed Student Loan Requirement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004934
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 305-7706

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22 TAC §471.4

The Texas State Board of Examiners of Psychologists proposes new §471.4, concerning Guaranteed Student Loan Requirement. The new rule would make the Board rule agree with the law.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the new rule will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed new rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700 or email brenda.skiff@tsbep.state.tx.us.

The new rule is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§471.4. Guaranteed Student Loan Requirement.

Nonrenewal for Default of Guaranteed Student Loan Requirement. The Board shall not renew the license of a licensee identified by the Texas Guaranteed Student Loan Corporation (Corporation) as a person in default on a guaranteed student loan, unless the licensee presents a certificate of repayment or non-default issued by the Corporation as provided in paragraphs (1) and (2) of this section. The Board shall provide the licensee an opportunity for a hearing prior to taking action concerning a nonrenewal of a license pursuant to Texas Education Code §57.491 Loan Default Ground for Nonrenewal of Professional or Occupational License.

(1) Applicants. The Board may issue an initial license to an applicant identified by the Corporation as being in default on a guaranteed student loan but the license shall not be renewed unless the licensee presents to the Board a certificate issued by the Corporation certifying that the licensee has entered a repayment agreement on the defaulted loan or the licensee is not in default on a loan guaranteed by the Corporation.

(2) Licensees. A licensee identified by the Corporation as being in default on a student loan shall not be allowed to renew any license unless:

(A) the renewal is the first renewal following receipt by the Board of the Corporation's list that includes the licensee's name among those in default on student loans; or

(B) the licensee presents to the Board a certificate issued by the Corporation certifying that the licensee has entered a repayment agreement on the defaulted loan or the licensee is not in default on a loan guaranteed by the Corporation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
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For further information, please call: (512) 305-7706

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER A. GENERAL PROVISIONS RELATING TO THE REQUIREMENTS OF LICENSURE

22 TAC §535.1

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Real Estate Commission (TREC or the commission) proposes the repeal of §535.1, concerning License Required. TREC renames the subchapter name from "General Provisions Relating to the Requirements of Licensure" to "Definitions". The repeal is proposed because the subjects addressed in the subchapter name and section are covered in new proposed amendments to Subchapter B which TREC is simultaneously proposing as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters will comprehensively address the subjects of the proposed repealed rules, repeal of the rules is necessary to avoid confusion and repetition.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeal. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the repeal.

Ms. DeHay also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more streamlined and readable rules.

Comments on the proposed repeal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.1. License Required.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201005017
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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SUBCHAPTER A. DEFINITIONS

22 TAC §535.1

The Texas Real Estate Commission (TREC or the commission) proposes new §535.1, concerning Definitions. TREC renames the subchapter name from "General Provisions Relating to the Requirements of Licensure" to "Definitions". The new subchapter name and new rule are proposed as part of a comprehensive rule review of 22 TAC Chapter 535. New §535.1 provides definitions for commonly used terms and phrases in Chapter 535. Generally speaking, the new rule corrects typographical errors, reorganizes, clarifies, and streamlines existing rules, and updates cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed new rule is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the new rule. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the new rule.

Ms. DeHay also has determined that for each year of the first five years the proposed new rule is in effect the public benefit anticipated as a result of enforcing the rule will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The new rule is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.1. Definitions.

The following terms and phrases, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Act--Texas Occupations Code, Chapter 1101.

(2) Business entity--A corporation, limited liability, partnership or other entity authorized under the Texas Business Organizations Code to engage in the real estate brokerage business in Texas and required to be licensed under Texas Occupations Code, Chapter 1101.

(3) Chapter 1102--Texas Occupations Code, Chapter 1102.

(4) Compensation--A commission, fee or other valuable consideration for real estate brokerage services provided by a license holder under the Act.

(5) Denial of a license--To disapprove an applicant for a broker, salesperson, apprentice inspector, real estate inspector, or professional inspector for failure to satisfy the commission as to the applicant's honesty, trustworthiness and integrity, or, if the applicant seeks registration as an easement or right-of-way agent, to disapprove an application for registration under §535.400 of this title (relating to Registration of Easement or Right-of-Way Agents).

(6) Inactive broker--A licensed broker who does not sponsor salespersons or perform any activities for which a broker license is required and who has been placed on inactive status by the commission.

(7) MCE--Mandatory Continuing Education required under the Act.

(8) Mailed--Sent by United States Mail to the last known mailing address or by email to the last known email address of a license holder under Chapter 1101 or Chapter 1102, or applicant, unless the commission is otherwise required by law to notify such persons by Unites States Mail.

(9) Place of business--A place where the licensee meets with clients and customers to transact business.

(10) Promptly--Three (3) calendar days unless otherwise defined in a specific chapter or section.

(11) Reasonable time--Ten (10) calendar days unless otherwise defined in a specific chapter or section.

(12) Rule--Any commission statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the commission and is filed with the Texas Register, including 22 TAC Chapters 533, 534, 535, and 537.

(13) SAE--Salesperson Annual Education required under the Act.

(14) State--One of the states, territories, and possessions of the United States and any foreign country or governmental subdivision thereof.

(15) Trust account--Any trust, escrow, custodial, property management account, or other account in which a licensee holds money on behalf of another person.

(16) Trust funds--Clients' money, earnest money, rents, advance fees, security deposits, or any money held on behalf of another person.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. GENERAL PROVISIONS RELATING TO THE REQUIREMENTS OF LICENSURE

22 TAC §§535.2 - 535.5, 535.16, 535.17, 535.20

The Texas Real Estate Commission (TREC) proposes amendments to §535.2, regarding Broker; §535.3, regarding Compensation to or Paid by a Salesperson; §535.16, regarding Listings; §535.17, regarding Appraisals; §535.20, regarding Procuring Prospects; new §535.4, regarding License Required; and §535.5, regarding License Not Required.

TREC renames the subchapter name from "Definitions" to "General Provisions Relating to the Requirements of Licensure".

The amendments to §535.2 articulate a broker's responsibilities to their sponsored salespersons, the public, and other brokers. Under the proposed rule, a broker is required to advise a sponsored salesperson of the scope of the salespersons authorized activities under the act and clarifies the liability of the broker for the activities of the salesperson if the broker permits a salesperson to engage in activities beyond the scope originally authorized. The amendments clarify that a broker is responsible for any property management activity conducted by their sponsored salespersons and for advertising of sponsored salespersons. The amendments permit a broker to designate in writing

another licensee to be responsible for day-to-day supervision of sponsored salespersons; however, the broker would continue to have overall responsibility of the salespersons. The amendments require a broker to maintain records of transactions for a period of 4 years; maintain written policies and procedures addressing specified activities; and promptly deliver commission correspondence to sponsored salespersons. The amendments clarify that the broker responsibility rules are not meant to create an employer/employee relationship where there is none.

The amendments to §535.3 regarding Compensation to or Paid by a Salesperson require that an agreement between a broker and sponsored salesperson regarding the compensation a salesperson receives or pays to other licensees must be in writing. New §535.4 regarding License Required is a compilation of existing rules that are put together into one comprehensive rule that addresses the instances in which a license is required under the Act, as well as a new provision which clarifies that a corporation or limited liability company owned by a broker or salesperson which receives compensation on behalf of the licensee must be licensed as a broker under the Act. New §535.5 regarding License Not Required is a compilation of existing rules that are put together into one comprehensive rule that addresses the instances in which a license is not required under the Act. The amendments to §535.16 change the name of the section and reorganize the subsections. The amendments to §535.17 reorganize the subsections. The amendment to §535.20 changes the name of the rule from "Procuring Prospects" to "Referrals from Unlicensed Persons."

Generally speaking, the amendments and new rules correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments and new rules are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments and new rules. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments and new rules.

Ms. DeHay also has determined that for each year of the first five years the amendments and new rules are in effect the public benefit anticipated as a result of enforcing the repeal will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments and new rules are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.2. Broker [~~Broker's~~] Responsibility.

(a) A broker is required to advise a sponsored salesperson of the scope of the salesperson's authorized activities under the Act. Unless such scope is limited or revoked in writing, a [~~A~~] broker is responsible for the authorized acts of the broker's salespersons, but the broker is not required to supervise the salespersons directly. If a broker permits a sponsored salesperson to conduct activities beyond the scope explicitly authorized by the broker, those too will be deemed to be authorized acts for which the broker is responsible.

(b) A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obliged to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision. [~~A broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the person the broker has agreed to represent.~~]

(c) A broker is responsible for the proper handling of trust funds [~~escrow monies~~] placed with the broker, although the broker may authorize other persons to sign checks on behalf of [~~for~~] the broker.

(d) A broker is responsible for any property management activity which requires a real estate license that is conducted by the broker's sponsored salespersons.

(e) A broker may designate another licensee to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of licensees sponsored by the broker. Any such designation must be in writing.

(f) Listings may only be solicited and accepted in a broker's name.

(g) A broker is responsible to ensure that a sponsored salesperson's advertising complies with §535.154 of this chapter.

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the following records, at a minimum, shall be maintained for at least four (4) years from the date of closing or termination of the contract in a format that can readily be made available to the commission.

(1) Disclosures;

(2) Commission Agreements such as listing agreements, buyer representation agreements or other written agreement relied upon to claim compensation;

(3) Work files;

(4) Contracts and related addenda;

(5) Receipts and disbursements of compensation for services subject to the Act;

(6) Property management contracts;

(7) Documents required by USPAP for appraisals; and

(8) Sponsorship agreements between the broker and sponsored salespersons.

(i) A broker shall maintain on a current basis written policies and procedures to ensure that:

(1) Each sponsored salesperson is advised of the scope of the salesperson's authorized activities subject to the Act and is competent to conduct such activities.

(2) Each sponsored salesperson maintains their license in active status at all times while they are engaging in activities subject to the Act.

(3) Any and all compensation paid to a sponsored salesperson for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.

(4) Each sponsored salesperson is provided on a timely basis, prior to the effective date of the change, notice of any change to the Act, Rules, or commission promulgated contract forms.

(5) In addition to completing statutory minimum continuing education requirements, each sponsored salesperson receives such additional educational instruction the broker may deem necessary to obtain and maintain on a current basis competency in the scope of the sponsored salesperson's practice subject to the Act.

(6) Each sponsored salesperson complies with the commission's advertising rules.

(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are handled by the broker with appropriate controls.

(8) Records are properly maintained pursuant to subsection (f) of this section.

(j) A broker must promptly respond to sponsored salespersons. clients, and licensees representing other parties in real estate transactions.

(k) A sponsoring broker shall deliver to or otherwise provide, within a reasonable time after receipt, mail and other correspondence from the commission to their sponsored salespersons. A broker may deliver such correspondence by facsimile or email.

(l) When the broker is a business entity, the designated broker is the person responsible for the broker responsibilities under this section.

(m) This section is not meant to create or require an employer/employee relationship between a broker and a sponsored salesperson.

§535.3. Compensation to or Paid by a Salesperson.

A salesperson may not receive a commission or other fee except with the written consent of the salesperson's sponsoring broker or the broker who sponsored the salesperson when the salesperson became entitled to the commission or fee. A salesperson may not pay a commission or other fee to another person except with the written consent of the salesperson's sponsoring broker.

§535.4. License Required.

(a) The Act applies to persons acting as real estate brokers or salespersons while physically within this state, regardless of the location of the real estate involved or the residence of the person's customers or clients. For the purposes of the Act, a person conducting brokerage business from another state by mail, telephone, the Internet, email or other medium is also considered acting within this state if all the prospective buyers, sellers, landlords, or tenants are legal residents of this state, and the real property concerned is located wholly or in part within this state.

(b) This section does not prohibit cooperative arrangements between non-resident brokers and Texas brokers pursuant to §1101.651(a)(2) of the Act and §535.131 of this title (relating to Unlawful Conduct: Splitting Fees).

(c) Unless otherwise exempted by the Act, a person must be licensed as a broker or salesperson to show a broker's listings.

(d) The employees, agents or associates of a licensed broker, including a business entity licensed as a broker, must be licensed as brokers or salespersons if they direct or supervise other persons who perform acts for which a license is required.

(e) A real estate license is required for a person to solicit listings or to negotiate in Texas for listings.

(f) A corporation or limited liability company owned by a broker or salesperson which receives compensation on behalf of the licensee must be licensed as a broker under the Act.

(g) Unless otherwise exempted by the Act, a person who manages real property or collects rentals for an owner of real property and also rents or leases the property for the owner for valuable consideration must be licensed.

(h) A person must be licensed as a broker to operate a rental agency.

(i) A real estate license is required of a subsidiary corporation, which, for compensation, negotiates in Texas for the sale of its parent corporation's real property.

(j) Arranging for a person to occupy a residential property is an act requiring a real estate license if the actor:

(1) does not own the property or lease the property from its owner;

(2) receives a valuable consideration; and

(3) is not exempted from the requirement of a license by §1101.005 of the Act.

(k) Except as provided by this section a real estate license is required for a person to receive a fee or other consideration for assisting another person to locate real property for sale, purchase, rent, or lease, such as the operation of a service which finds apartments or homes.

(l) The compilation and distribution of information relating to rental vacancies or property for sale, purchase, rent, or lease is activity for which a real estate license is required if payment of any fee or other consideration received by the person who compiles and distributes the information is contingent upon the sale, purchase, rental, or lease of the property. An advance fee is a contingent fee if the fee must be returned if the property is not sold, purchased, rented, or leased.

(m) A person must be licensed as a broker or salesperson if, for compensation, the person:

(1) advertises for others regarding the sale, purchase, rent or lease of real property;

(2) accepts calls received in response to such advertisements; and

(3) refers the callers to the owner of the property.

§535.5. License Not Required.

(a) Acting as a principal, a person may purchase, sell, lease, or sublease real estate for profit without being licensed as a broker or salesperson.

(b) A person may acquire an option or contract to purchase real estate and then sell it or offer to sell it without having a real estate license.

(c) A person who owns property jointly may sell and convey title to his or her interest in the property, but to act for compensation or with the expectation of compensation as an agent for the other owner, the person must be licensed unless otherwise exempted by the Act.

(d) A real estate license is not required for an individual employed by a business entity for the purpose of buying, selling, or leasing real property for the entity. An entity is considered to be an owner if it holds record title to the property or has an equitable title or right acquired by contract with the record title holder.

(e) Trade associations or other organizations that provide an electronic listing service for their members, but do not receive com-

pensation when the real estate is sold, are not required to be licensed under the Act.

(f) Auctioneers are not required to be licensed under the Act when auctioning real property for sale. However, a licensed auctioneer may not show the real property, prepare offers, or negotiate contracts unless the auctioneer is also licensed under the Act.

(g) An answering service or clerical or secretarial employees identified to callers as such to confirm information concerning the size, price and terms of property advertised are not required to be licensed under the Act.

(h) A broker may hire an unlicensed person to act as a host or hostess at a property being offered for sale by the broker, provided the unlicensed person engages in no activity for which a license is required.

§535.16. Listings; Net Listings.

(a) A broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the broker has agreed to represent. [~~Trade associations or other organizations which provide a computerized listing service for their members, but which do not receive compensation when the real estate is sold would not be, are not required to be licensed under Texas Occupations Code, Chapter 1101 (the Act).~~]

(b) A "net listing" is a listing agreement in which the broker's commission is the difference ("net") between the sales proceeds and an amount desired by the owner of the real property. A broker may not take net listings unless the principal requires a net listing and the principal appears to be familiar with current market values of real property. [~~When a broker accepts a listing, the broker enters into a fiduciary relationship with the principal, whereby the broker is obligated to make diligent efforts to obtain the best price possible for the principal.~~] The use of a net listing places an upper limit on the principal's expectancy and places the broker's interest above the principal's interest with reference to obtaining the best possible price. If a net listing is used, the listing agreement must [~~a broker should modify the listing agreement so as to~~] assure the principal of not less than the principal's desired price and [~~to~~] limit the broker to a specified maximum commission.

(c) (No change.)

§535.17. Appraisals.

[~~(a) A salesperson may make, sign, and present real estate appraisals for the salesperson's sponsoring broker, but the salesperson must submit appraisals in the broker's name and the broker is responsible for the appraisals.~~]

[~~(b) The Texas Occupations Code, Chapter 1101 (the Act) does not apply to appraisals performed by the employees of a financial institution or investment firm in connection with a contemplated loan or investment by their employers.~~]

(a) [~~(c)~~] Except as provided by this section, appraisals of real property performed in this state by Texas real estate licensees must be conducted in accordance with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation in effect at the time the appraisal is performed. If a real estate licensee, for a separate fee, provides an opinion of value or comparative market analysis which does not conform with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, the licensee shall also provide the person for whom the opinion or analysis is prepared with a written statement containing the following language: "THIS IS AN OPINION OF VALUE OR COMPARATIVE MARKET ANALYSIS AND SHOULD NOT BE CONSIDERED AN APPRAISAL. In making any decision that relies upon my work, you should know that I have not followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation."

(b) [~~(d)~~] The statement required by subsection (a) of this section must be made part of any written opinion or analysis report and must be reproduced verbatim.

(c) [~~(e)~~] The exception allowed by subsection (a) of this section does not apply to a transaction in which the Resolution Trust Corporation or a federal financial institutions regulatory agency has required compliance with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation.

(d) A salesperson may prepare, sign, and present real estate appraisals for the salesperson's sponsoring broker, but the salesperson must submit appraisals in the broker's name and the broker is responsible for the appraisals.

(e) The Act does not apply to appraisals performed by the employees of a financial institution or investment firm in connection with a contemplated loan or investment by their employers.

§535.20. Referrals From Unlicensed Persons [~~Procuring Prospects~~].

(a) Referring a prospective buyer, seller, landlord, or tenant to another person in connection with a proposed real estate transaction is an act requiring the person making the referral to be licensed if the referral is made with the expectation of receiving valuable consideration. For the purposes of this section, the term "valuable consideration" includes but is not limited to money, gifts of merchandise having a retail value greater than $50, rent bonuses and discounts.

(b) A person is not required to be licensed as a real estate broker or salesperson if all of the following conditions are met.

(1) The person is engaged in the business of selling goods or services to the public.

(2) The person sells goods or services to a real estate licensee who intends to offer the goods or services as an inducement to potential buyers, sellers, landlords or tenants.

(3) After selling the goods or services to the real estate licensee, the person refers the person's customers to the real estate licensee.

(4) The payment to the person for the goods or services is not contingent upon the consummation of a real estate transaction by the person's customers.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta R. DeHay
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Texas Real Estate Commission
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SUBCHAPTER B. DEFINITIONS

22 TAC §§535.12, 535.13, 535.15, 535.19, 535.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Real Estate Commission (TREC) proposes the repeal of §535.12, regarding General; §535.13, regarding Dispositions of Real Estate; §535.15, regarding Listings; §535.19, regarding Locating Property; and §535.21, regarding Unimproved Lot Sales; Listing Publications. The repeals are proposed because the subjects addressed in the subchapter heading and sections are covered in new proposed amendments to Subchapter B which TREC is simultaneously proposing as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters and sections will comprehensively address the subjects of the proposed repealed rules, repeal of the rules is necessary to avoid confusion and repetition.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed repeals are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeals. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the repeals.

Ms. DeHay also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register*.

The repeals are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.12. General.
§535.13. Dispositions of Real Estate.
§535.15. Negotiations.
§535.19. Locating Property.
§535.21. Unimproved Lot Sales; Listing Publications.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. EXEMPTIONS TO REQUIREMENTS OF LICENSURE

22 TAC §§535.31, 535.32, 535.34

The Texas Real Estate Commission (TREC or the commission) proposes amendments to §535.31, regarding Attorneys at Law; §535.32, regarding Attorneys in Fact; and §535.34, regarding Salespersons Employed by an Owner of Land and Structures Erected by the Owner.

The amendments to §535.31 shorten the reference to the Act as defined in the definitions section of the rules. The amendments to §535.32 clarify that a power of attorney must be valid and changes the term "agency" to "brokerage." The amendments to §535.34 references the provision in the Act to which it refers, clarifies that an independent contractor is not an employee, and incorporates the text repealed from §535.35.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments.

Ms. DeHay also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.31. Attorneys at Law.

A licensed attorney is exempt from the requirements of [~~Texas Occupations Code, Chapter~~ 1101, (]the Act[)] but cannot sponsor real estate salespersons or serve as the designated officer or manager of a licensed corporation or limited liability company unless the attorney is also licensed as a real estate broker. This provision is not a waiver of the standards of eligibility and qualification elsewhere established in the Act.

§535.32. Attorneys in Fact.

A person holding a valid power of attorney [~~which is~~] recorded in the county in which the particular real property is located and which specifically describes the real property to be sold may act as a real estate agent for the owner of such property without being licensed as a real estate broker or salesperson, provided the person does not use powers of attorney to engage in the real estate brokerage [~~agency~~] business.

§535.34. Salespersons Employed by an Owner of Land and Structures Erected by the Owner.

(a) As referenced in §1101.5(6) of the Act, "salesperson, [~~Salesperson~~] employed by an owner" means a person employed and

directly compensated by an owner. An independent contractor is not an employee.

(b) Withholding income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes from wages paid another person is considered evidence of employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §535.35

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Real Estate Commission (TREC or the commission) proposes the repeal of §535.35, regarding Employees Renting and Leasing Employer's Real Estate. The repeal is proposed because the subjects addressed in the section is covered in new proposed amendments to Subchapter C which TREC is simultaneously proposing as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters and sections will comprehensively address the subjects of the proposed repealed rule, repeal of the rule is necessary to avoid confusion and repetition.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeal. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the repeal.

Ms. DeHay also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.35. Employees Renting and Leasing Employer's Real Estate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. THE COMMISSION

22 TAC §535.42

The Texas Real Estate Commission (TREC or the commission) proposes an amendment to §535.42, regarding Jurisdiction and Authority. The amendment to §535.42 makes the section more readable. The amendment is proposed as part of a comprehensive rule review of 22 TAC Chapter 535.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendment. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendment.

Ms. DeHay also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.42. Jurisdiction and Authority.

The commission does not:

(1) mediate disputes between or among licensees concerning entitlement to sales commissions; or

(2) recommend individual licensees to the public.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005023

Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §§535.50, 535.53 - 535.57

The Texas Real Estate Commission (TREC or the commission) proposes new §535.50, regarding Definitions; amendments to §535.53, regarding Corporations and Limited Liability Companies; new §535.54, regarding General Provisions Regarding Education and Experience for a License; new §535.55, regarding Education Requirements for a Salesperson License; new §535.56, regarding Education and Experience requirements for a Broker License; and new §535.57, regarding Examination Requirements for a License. The amendments and new rules are proposed as part of a comprehensive rule review of 22 TAC Chapter 535.

The definitions in §535.50 are moved from §535.71 and will apply to Subchapter E regarding Requirements for Licensure; Subchapter F regarding Pre-License Education and Examination, and Subchapter G regarding Mandatory Continuing Education. Subchapter F will only apply to examinations and accreditation of schools, instructors and courses in pre-license education programs.

The amendments to §535.53 clarify the requirements for obtaining and maintaining a broker license for a corporation or limited liability company. New subsection (c) of §535.53 provides that if a corporation or limited liability company is dissolved with the Office of the Secretary of State the license becomes null and void.

New §§535.54, 535.55, and 535.56 are moved from existing §535.63 in Subchapter F since these sections apply to general education, experience and examination requirements for a license and more appropriately fit under Subchapter E (Requirements for License). New subsection (b) in §535.54 provides that an associate's degree counts towards all the related education requirements (60 hours) for a salesperson license, and a bachelor's degree counts towards all the related education requirements (630 hours) for a broker license.

New §535.57 is moved from existing §535.61. The commission has the authority under §1101.362 of the Act to waive some or all of the education and experience requirements for someone who has been licensed within the six years preceding the date the application is filed. Under current §535.56, the commission has waived the education and experience required for a broker license for a broker who was licensed in the preceding six years (the maximum authorized under the Act) and otherwise meets the requirements of the section. The proposed rule would change the period from six years to four years so that a person who was licensed in the preceding four years and otherwise meets the requirements of the section (experience) could apply for a broker license. Under §535.57, the applicant would be required to take the examination if the applicant was licensed more than two years prior to the filing of the application.

Generally speaking, the amendment and new rules correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendment and new rules are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendment and new rules as proposed. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendment and new rules.

Ms. DeHay also has determined that for each year of the first five years the amendment and new rules are in effect the public benefit anticipated as a result of enforcing the amendment and new rules will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment and new rules are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.50. Definitions.

The following words and terms, when used in Subchapter E, F or G of this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Alternative delivery method--A method of course delivery other than classroom or correspondence. Alternative delivery method courses include online courses and webinars.

(2) Applicant--A person seeking approval to be a provider or instructor of a course for which core or mandatory continuing education credit is given.

(3) Certified MCE instructor--An instructor approved by the Texas Real Estate Commission and certified to teach the required legal update course or the required ethics course.

(4) Distance learning course--A correspondence course, alternative delivery method course or course offered through video presentation.

(5) Elective credits--The hours of mandatory continuing education required to renew a license for which a specific course is not required.

(6) Hour--Fifty minutes of actual session time.

(7) Instructor--A person approved by the Texas Real Estate Commission to teach core or mandatory continuing education courses.

(8) MCE--Mandatory Continuing Education.

(9) Proctor--A person who monitors a final examination for a course offered by a provider under the guidelines contained in this section. A proctor may be a course instructor, the provider, an employee of a college or university testing center, a librarian, or other person approved by the commission.

(10) Provider--Any person offering a course for which credit may be granted by the Commission to a licensee or applicant, regardless of whether the Commission must approve or certify the person to offer the course.

(11) Related course--A course determined to be acceptable by the commission to count towards related credit. The commission will periodically publish lists of acceptable real estate related courses.

(12) Required legal course or legal credits--The required legal update or legal ethics courses or credits earned for attending such courses.

(13) Required legal ethics course--A required course created for and approved by the Texas Real Estate Commission to satisfy three of the six legal hours of mandatory continuing education required by §1101.455 of the Act.

(14) Required legal update course--A required course created for and approved by the Texas Real Estate Commission to satisfy three of the six legal hours of mandatory continuing education required by §1101.455 of the Act.

(15) School--A person accredited by the Texas Real Estate Commission to offer courses for which core credit is given.

(16) Student--An individual taking a core or MCE course for TREC credit.

§535.53. Corporations and Limited Liability Companies.

(a) For the purposes of qualifying for, maintaining, or renewing a license, a corporation or limited liability company must designate one individual [~~person~~] holding an active Texas real estate broker license to act for it. The designated broker must be an officer of the corporation or a manager of a limited liability company. The corporation or limited liability company may not act as a broker during any period in which it has not designated a person to act for it who meets the requirements of [~~Texas Occupations Code, Chapter 1101~~ (]the Act[)]. Upon any change in the corporation or limited liability company's designated individual, the corporation or limited liability company must provide proof to the commission of the designated individual's current status as an officer or manager for that entity. A broker may not act as a designated person at any time while the broker's license is inactive, expired, suspended or revoked.

(b) (No change.)

(c) If a licensed corporation or limited liability company is dissolved with the Office of the Secretary of State, then the license immediately becomes null and void.

§535.54. General Provisions Regarding Education and Experience Requirements for a License.

(a) License or experience in another state. Except as provided by this subchapter and the Act, the commission will not accept a person's license in another state or experience in real estate brokerage or any related business in satisfaction of education or experience required for a license.

(b) Coursework requirements in related subjects. A person who holds an associate degree will be deemed to have completed the number of related hours required for a salesperson license. A person who holds a bachelor's degree will be deemed to have completed the number of related hours required for a broker license.

(c) The commission will not grant credit to a student who was previously awarded credit for completing a course with substantially the same course content within the previous two-year period.

§535.55. Education Requirements for a Salesperson License.

Notwithstanding §1101.451(f) of the Act, the commission may waive the education required for a real estate salesperson license if the applicant:

(1) was licensed either as a Texas real estate broker or as a Texas real estate salesperson within six years prior to the filing of the application; and

(2) completed any core real estate courses or real estate related courses that would have been required for a timely renewal of the prior license, or, if the renewal of the prior license was not subject to the completion of core real estate courses or real estate related courses, completed at least 15 hours of mandatory continuing education (MCE) courses within the two-year period prior to the filing of an application for an active license.

§535.56. Education and Experience Requirements for a Broker License.

(a) An applicant for a broker license must have two years of experience actively practicing as a broker or salesperson in Texas during the 36 months prior to filing the application, as follows:

(1) Experience is measured from the date a license is issued, and inactive periods caused by lack of sponsorship, or any other reason, cannot be included as active experience.

(2) Under §1101.357 of the Act, a person who is the designated officer of a corporation or limited liability company that is licensed as a real estate broker in another state is deemed to be a licensed real estate broker in another state. A person licensed in another state may derive the required two years' experience from periods in which the person was licensed in one or more states.

(b) Notwithstanding §1101.451(f) of the Act, the commission may waive education and experience required for a real estate broker license if the applicant satisfies each of the following conditions.

(1) The applicant was licensed as a Texas real estate broker or salesperson within four years prior to the filing of the application.

(2) If the applicant was previously licensed as a Texas real estate broker, the applicant has completed at least 15 hours of mandatory continuing education (MCE) courses within the two-year period prior to the filing of an application for an active license. If the applicant was previously licensed as a Texas real estate salesperson, the applicant satisfies all current education requirements for an original broker license.

(3) The applicant has at least two years of active experience as a licensed real estate broker or salesperson during the eight-year period prior to the filing of the application.

§535.57. Examination Requirements for a License.

(a) Notwithstanding §1101.451(f) of the Act, the commission shall waive the examination requirement for an applicant for a broker license who has been licensed as a broker in this state within two years prior to the filing of the application. The commission shall waive the examination requirement for an applicant for a salesperson license who has been licensed in this state as a broker or salesperson within two years prior to the filing of the application.

(b) The commission may waive the national portion of the examination of an applicant for a broker or salesperson license if the applicant maintains an active license in another state, equivalent to the license being applied for, and has passed a comparable national examination accredited or certified by a nationally recognized real estate regulator association.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §§535.71 - 535.74

The Texas Real Estate Commission (TREC or the commission) proposes amendments to §535.71, regarding Mandatory Continuing Education: Approval of Providers, Courses and Instructors; §535.72, regarding Mandatory Continuing Education: Presentation of Courses, Advertising and Records; §535.73, regarding Compliance and Enforcement; and new §535.74, regarding Additional Information Related to an Application. TREC is simultaneously proposing the amendments and new rule as part of a comprehensive rule review of 22 TAC Chapter 535.

The amendments to §535.71(a) delete the definitions as they have been moved to Subchapter E. Subsection (b) is deleted because the requirements are referenced under §535.92; subsection (c) is deleted because the application forms will be approved by the commission but not promulgated by rule; all the subsections are relettered; the renewal term for instructor approval is changed from five to two years in subsections (i) and (j); alternative delivery method courses for required legal credit will need to be certified by a distance learning certification center (IDECC) that is acceptable to the commission under new subsection (z); some of the paragraphs of subsection (z) are deleted and renumbered because IDECC certification ensures the requirements of that subparagraph and it was therefore redundant.

The amendments to §535.72 delete the reference to specific form numbers as they will no longer be promulgated by rule. Subsection (i) is a new provision which requires a provider to make available to students and maintain for commission review instructor and course evaluation for each course. Forms created and approved by the commission must be used. Under relettered subsection (k), a provider is required to maintain the same types of records and for the same period of time as required of schools accredited under Subchapter F regarding core education providers.

The amendments to §535.73 delete the reference to evaluations as evaluations are now covered in the amendments to §535.72.

New §535.74(a) deals with additional information related to an application for an MCE provider, course or instructor; and subsection (b) which addresses the commission's delegation of authority to staff.

Generally speaking, the amendments and new rule correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments and new rule are in effect there will be no significant fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments and new rule. There is no anticipated significant economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments and new rule.

Ms. DeHay also has determined that for each year of the first five years the amendments and new rule are in effect the public benefit anticipated as a result of enforcing the amendments and new rule will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments and new rule are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.71. [~~Mandatory Continuing Education:~~] Approval of Providers, Courses, and Instructors.

[~~(a) The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.~~]

[~~(1) Act--The Real Estate License Act, Texas Occupations Code, Chapter 1101.~~]

[~~(2) Applicant--A person seeking approval to be a provider or instructor of a course for which mandatory continuing education credit is given.~~]

[~~(3) Hour--Fifty minutes of actual session time.~~]

[~~(4) Certified legal course instructor--An instructor approved by the Texas Real Estate Commission and certified to teach the required legal update course or the required ethics course.~~]

[~~(5) Commission--The Texas Real Estate Commission.~~]

[~~(6) Day--A calendar day.~~]

[~~(7) Distance learning course--A correspondence course, alternative delivery method course or course offered through video presentation.~~]

[~~(8) Elective credits--The nine hours of non-legal mandatory continuing education required by §1101.455 of the Act.~~]

[~~(9) Instructor--A person approved by the Texas Real Estate Commission to teach mandatory continuing education courses.~~]

[~~(10) MCE--Mandatory Continuing Education.~~]

[~~(11) Person--An individual, partnership, or a corporation, foreign or domestic.~~]

[~~(12) Proctor--A person who monitors a final examination for a course offered by a provider under the guidelines contained in this section. A proctor may be a course instructor, the provider, an~~

employee of a college or university testing center, a librarian, or other person approved by the commission.]

[(13) Provider--A person approved by the Texas Real Estate Commission to offer courses for which mandatory continuing education credit is given.]

[(14) Required legal ethics course--A required course created for and approved by the Texas Real Estate Commission to satisfy three of the six legal hours of mandatory continuing education required by §1101.455 of the Act.]

[(15) Required legal update course--A required course created for and approved by the Texas Real Estate Commission to satisfy three of the six legal hours of mandatory continuing education required by §1101.455 of the Act.]

[(16) Required legal course or legal credits--The required legal update or legal ethics courses or credits earned for attending such courses.]

[(17) Student--An individual taking an MCE course for credit.]

[(b) Mandatory Continuing Education Requirements. On or after January 1, 2005 and except as authorized by §535.92 of this chapter, for the next and all subsequent renewals of a license on active status that is not subject to the annual education requirements of §1101.454 of the Act, the license holder must attend during the term of the current license, two Commission-developed legal courses consisting of a three-hour required legal update course and a three-hour required legal ethics course to satisfy the six legal hours of mandatory continuing education required by §1101.455 of the Act. The remaining nine hours required by §1101.455 of the Act may consist of elective credit courses registered with the commission under this section.]

[(c) Application. A person who wishes to offer courses accepted by the commission for MCE credit shall apply to the commission for approval to be an MCE provider and shall register each MCE course using application forms prepared by the commission. The commission may refuse to accept any application which is not complete or which is not accompanied by the appropriate filing fee. Each prospective provider shall submit a provider application and at least one principal information form.]

[(d) Forms. The commission adopts by reference the following forms published and available from the commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us:]

[(1) MCE Form 1A-2, MCE Provider Application;]

[(2) MCE Form 1B-2, MCE Provider Application Supplement;]

[(3) MCE Form 2-3, MCE Principal Information Form;]

[(4) MCE Form 3A-3, MCE Course Application;]

[(5) MCE Form 3B-3, MCE Course Application Supplement;]

[(6) MCE Form 8-4, MCE Course Completion Roster;]

[(7) MCE Form 9-8, Alternative Instructional Methods Reporting Form;]

[(8) MCE Form 10-2, MCE Credit Request for an Out of State Course;]

[(9) MCE Form 11-4, MCE Instructor Credit Request;]

[(10) MCE Form 12-2, Individual MCE Elective Credit Request for State Bar Course;]

[(11) MCE Form 14-1, Individual MCE Partial Credit Request Form]

[(12) MCE Form 15-0, Individual MCE Elective Credit Request for Professional Designation Course; and]

[(13) MCE Form 16-1, Instructor Application - MCE Elective.]

(a) [(e)] Provider application. To be approved as an MCE provider, a person must satisfy the commission as to the person's ability to administer with honesty, trustworthiness and integrity a course of continuing education in MCE subjects registered with the commission. If the person proposes to employ independent contractors to conduct or to administer the courses, any independent contractor named in the application must meet this standard as if the independent contractor were the applicant; however, the applicant is responsible for responding to communications from the commission relating to the application.

(b) [(f)] Additional information related to application. The commission may request that an applicant provide additional information, and the commission may terminate an application without further notice if the applicant fails to provide the additional information within 60 days of the mailing of a request by the commission.

(c) [(g)] Fees. The commission shall establish fees in accordance with the provisions of [the Act,] §1101.152 of the Act, at such times as the commission deems appropriate. Fees are not refundable and must be submitted in the form of a check or money order, or, in the case of state agencies, colleges or universities, in a form of payment acceptable to the commission.

(d) [(h)] Approval of applicants. The commission may authorize the manager or director of the education and licensing services division of the commission, or a designate, to determine whether applications for MCE providers or instructors should be approved or certified. The commission may disapprove an application for failure to satisfy the commission as to the applicant's honesty, trustworthiness or integrity, or for any reason which would be a ground to suspend or revoke a real estate license. If an application is disapproved, the commission shall provide written notice to the applicant detailing the basis of the decision.

(e) [(i)] Appeal. An applicant may appeal a disapproval by filing with the commission a written request for a hearing within 10 days after the receipt of the notice of disapproval. Following the hearing, the commission may sustain or withdraw the disapproval or establish conditions for the approval of a provider, course or instructor. Proceedings involving applications shall be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001. Venue for any hearing conducted under this section shall be in Travis County.

(f) [(j)] Power of attorney. If a provider does not maintain a fixed office in this state for the duration of the provider's approval to offer courses, the provider shall designate a resident of this state as attorney-in-fact to accept service of process and act as custodian of any records in Texas which the provider is required to maintain by these sections. A power-of-attorney designating the resident must be filed with the commission in a form acceptable to the commission.

(g) [(k)] Subsequent application for provider approval or course registration. Unless withdrawn earlier for cause as provided by these sections, a provider's authority to offer courses for which MCE credit is given expires two years from the date the provider is approved by the commission. Authority to offer any MCE courses ends with the expiration of the provider's approval, and the provider must pay current fees and reapply for approval as a provider in order to offer MCE courses again. An elective credit course registered with

the commission may be offered by the provider for a period of two years after the course is registered or until the provider's authority to act as a provider finally expires or is withdrawn for cause, whichever first occurs. If a course was originally registered by another provider, the registration period is measured from the date of registration for the original provider. A provider may apply for approval to be a provider for another two years no sooner than six months prior to the expiration of existing provider approval.

(h) [~~(l)~~] Approval of instructor. A person who wishes to be an instructor of any MCE course shall apply to the commission for approval using an application form approved by the commission. To be approved as an instructor of any MCE course, an applicant must satisfy the commission as to the applicant's honesty, trustworthiness and integrity. Subsections (b) - (e) [~~(f) - (i)~~] of this section apply to an applicant for approval of an instructor.

(i) [~~(m)~~] Term of instructor approval. If the commission determines that the applicant meets the standards for instructor approval, the commission shall approve the application and provide a written notice of the approval to the applicant. Unless surrendered or revoked for cause, the approval will be valid for a period of two [~~five~~] years.

(j) [~~(n)~~] Subsequent application for instructor approval. No more than six months prior to the expiration of the current approval, an instructor may apply for approval for another two [~~five~~] year period.

(k) [~~(o)~~] Required legal update and ethics courses. The commission shall approve bi-annually a legal update course and a legal ethics course which shall be conducted through providers by instructors certified by the commission under this subchapter. The subject matter and course materials for the courses shall be created for and approved by the commission. The courses expire on December 31 of each odd-numbered year and shall be replaced with new courses approved by the commission. A provider may not offer a new course until an instructor of the course obtains recertification by attending a new instructor training program. Providers must acquire the commission-developed course materials and utilize such materials to conduct the required legal courses. The required legal courses must be conducted as prescribed by the rules in this subchapter and the course materials developed for the commission.

(l) [~~(p)~~] Modification of the required legal courses. Providers and instructors may modify a required legal course only to provide additional information on the same or similar topics covered in the course or to create distance learning courses that are substantially similar to the live courses developed for the commission. To the extent that a required legal course is modified or integrated into a longer course for which additional elective credit is requested, the commission shall grant elective and legal credit for the combined course.

(m) [~~(q)~~] Instructor certification. Only instructors certified by the commission may teach the required legal courses or develop distance learning courses for the presentation of required legal courses. An instructor must obtain prior commission approval under subsection (n) [~~(r)~~] of this section prior to attending an instructor training program. The commission shall issue a written certification to an instructor to teach the applicable required legal course(s) upon the instructor's satisfactory completion of a training program to teach the required legal course(s) that is acceptable to the commission. An instructor may obtain certification to teach either one or both required legal courses. A certified legal course instructor may teach the required legal courses for any approved provider after the instructor has attended an instructor training program. A certified legal course instructor may not independently conduct a required legal course unless the instructor has also obtained approval as a provider. An instructor must obtain written certification from the commission prior to teaching the required legal courses and prior to representing to any provider or other party that he or she is certified or may be certified as a legal course instructor. An instructor's certification to teach a required legal course expires on December 31 of every odd-numbered year. An instructor may obtain recertification by attending a new instructor training program.

(n) [~~(r)~~] Standards for approval of instructors of required legal courses. Prior to attending an instructor training course, a person must obtain commission approval to be an instructor using [~~Form ED 4-2,~~] Instructor Application - Core, Legal Update, and Ethics, approved [~~adopted~~] by the commission. To be approved as an instructor of a required legal update or ethics course, a person must possess the following qualifications:

(1) a college degree in the subject area of Real Estate, or five years of professional experience in the subject areas of Principles of Real Estate, Law of Agency, and Law of Contracts; and

(2) three years experience in teaching or training; or

(3) the equivalent of paragraphs (1) and (2) of this subsection as determined by the commission after due consideration of the applicant's professional experience, research, authorship or other significant endeavors in the subject area.

(o) [~~(s)~~] Approval of instructor. If the commission determines that the applicant meets the standards for instructor approval, the commission shall approve the application and provide a written notice of the approval to the applicant. Unless surrendered or revoked for cause, the approval will be valid for a period of two [~~five~~] years.

(p) [~~(t)~~] Elective credit courses. To be approved to offer a course for MCE elective credit, the provider must demonstrate that the course subject matter is appropriate for a continuing education course for real estate licensees and that the information provided in the course will be current and accurate by submitting a brief statement that describes the objective of the course and explains how the subject matter is related to activities for which a real estate license is required, including but not limited to relevant issues in the real estate market or topics which increase or support the licensee's development of skill and competence.

(q) [~~(u)~~] Elective course application. A provider applicant must submit an [~~MCE Form 3A-3,~~] MCE Course Application and receive written acknowledgment from the commission prior to offering an MCE elective course. Prior to advertising or offering a course offered by another provider, the subsequent provider must submit a [~~an MCE Form 3B-3,~~] Course Application Supplement and receive written acknowledgment from the commission.

(r) [~~(v)~~] Legal update and legal ethics course application. A provider must submit a [~~an~~] MCE [~~form 3B-3,~~] Course Application Supplement and receive written acknowledgment from the commission prior to offering a required legal update or required legal ethics course.

(s) [~~(w)~~] Core courses for elective credit. Courses approved by the commission for core real estate course credit provided in [~~the Act,~~] §1101.356 and §1101.358 of the Act[~~,~~] may be accepted for satisfying MCE elective credit course requirements provided the student files a course completion certificate with the commission.

(t) [~~(x)~~] Acceptable combined courses. An elective credit course offered by a provider to satisfy all or part of the nine hours of other than legal topics required by [~~the Act,~~] §1101.455 of the Act[~~,~~] may be offered with the required legal update course or required legal ethics course.

(u) [~~(y)~~] Required legal courses for real estate related courses. MCE legal update and legal ethics courses may be accepted by the

commission as real estate related courses for satisfying the education requirements of §1101.356 and §1101.358, of the Act.

(v) [~~(z)~~] Correspondence courses for elective credit. An MCE provider may register an MCE elective course by correspondence with the commission if the course is subject to the following conditions:

(1) the course must be offered by a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, which offers correspondence courses, whether credit or noncredit, in other disciplines;

(2) the content of the course must satisfy the requirements of [~~the Act,~~] §1101.455 of the Act[~~,~~] and this section [~~these sections~~]; and

(3) the course does not include a request for required legal course credit.

(w) [~~(aa)~~] Alternative delivery method courses for elective credit. An MCE provider may register an MCE elective course by alternative delivery method with the commission if the course is subject to the following conditions:

(1) the content of the course must satisfy the requirements of [~~the Act,~~] §1101.455 of the Act[~~,~~] and this section [~~these sections~~];

(2) the course does not include a request for required legal course credit; and

(3) every provider offering a registered course under this subsection shall:

(A) ensure that a qualified person is available to answer students' questions or provide assistance as necessary;

(B) provide that procedures are in place to ensure that the student who completes the work is the student who is enrolled in the course; and

(C) certify students as successfully completing the course only if the student:

(i) has completed all instructional modules; and

(ii) has attended any hours of live instruction and/or testing required for a given course.

(x) [~~(bb)~~] Correspondence courses for required legal credit. The commission may approve a provider to offer an MCE required legal ethics course by correspondence subject to the following conditions:

(1) the course must be offered by a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, which offers correspondence courses, whether credit or noncredit, in other disciplines;

(2) the content of the course must satisfy the requirements of [~~the Act,~~] §1101.455 of the Act and this section [~~these sections,~~] and must be substantially similar to the legal courses disseminated and updated by the Commission;

(3) students receiving MCE credit for the course must pass either:

(A) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(B) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks MCE credit; and

(4) written course work required of students must be graded by an approved instructor or the provider's coordinator or director, who is available to answer students' questions or provide assistance as necessary, using answer keys approved by the instructor or provider.

(y) [~~(cc)~~] Each required legal course offered by correspondence must contain the following:

(1) course description;

(2) learning objectives;

(3) evaluation techniques;

(4) lessons;

(5) learning activities;

(6) final examination;

(7) source materials disseminated by the Commission including all updates; and

(8) instructor grading guidelines, including acceptable answers for lessons, assessments and examinations.

(z) [~~(dd)~~] Alternative delivery method courses for required legal credit. The commission may accept required legal courses offered by alternative delivery method subject to the following conditions.

(1) The content of the course must satisfy the requirements of [~~the Act,~~] §1101.455 of the Act and this section [~~these sections,~~] and must be substantially similar to the legal courses disseminated and updated by the Commission.

(2) The course was certified by a distance learning certification center that is acceptable to the commission.

(3) An approved instructor or the provider's coordinator/director graded the written course work.

(4) The provider:

(A) ensured that a qualified person was available to answer students' questions or provide assistance as necessary;

(B) certified students as successfully completing the course only if the student:

(i) completed all instructional modules required to demonstrate mastery of the material;

(ii) attended any hours of live instruction and/or testing required for a given course; and

(iii) passed either:

(I) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(II) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks credit; and

(III) provided the students with the same materials given to students who attend the same course by live instruction.

[(2) Every course accepted under this subsection shall teach to mastery. Teaching to mastery means that the course must, at a minimum:]

[(A) divide the material into major units of instruction that follows the outline of the applicable required legal course for delivery on a computer or other approved interactive audio or audiovisual programs;]

[(B) specify the learning objectives for each unit of instruction;]

[(C) specify an objective, quantitative criterion for mastery used for each learning objective;]

[(D) implement a structured learning method by which each student is able to attain each learning objective;]

[(E) provide a means of diagnostic assessment of each student's performance on an ongoing basis during each unit of instruction, measuring what each student has learned and not learned at regular intervals throughout each unit of instruction;]

[(F) provide a means of tailoring the instruction to the needs of each student as identified in subparagraph (D) of this paragraph. The process of tailoring the instruction shall ensure that each student receives adequate remediation for specific deficiencies identified by the diagnostic assessment;]

[(G) continue the appropriate remediation on an individualized basis until the student demonstrates achievement of mastery of each unit; and]

[(H) require that the student demonstrate mastery of all material covered by the learning objectives for the module before the module is completed.]

[(3) The commission must approve the method by which each of the above elements of mastery in paragraph (2)(A) - (H) of this subsection is accomplished.]

[(4) The rationale for the education processes implemented in the course must be based on sound instructional strategies which have been systematically designed and proven effective through educational research and development. The basis and rationale for any proposed instructional approach must be specified in the application for approval. Programs which consist primarily of text material will not be approved.]

[(5) An approved instructor or the provider's coordinator/director shall grade the written course work.]

[(6) Every provider offering an approved course under this subsection shall:]

[(A) ensure that a qualified person is available to answer students' questions or provide assistance as necessary;]

[(B) satisfy the commission that procedures are in place to ensure that the student who completes the work is the student who is enrolled in the course;]

[(C) certify students as successfully completing the course only if the student;]

[(i) has completed all instructional modules required to demonstrate mastery of the material;]

[(ii) has attended any hours of live instruction and/or testing required for a given course; and]

[(iii) has passed either:]

[(I) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or]

[(II) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks MCE credit; and]

[(D) provide the students with the same materials given to students who attend the same course by live instruction.]

(aa) [(ee)] Supervised Video Instruction for elective course credit. A provider may register a course under subsection (q) [(u)] of this section to be taught by supervised video instruction if:

(1) the provider complies with §535.72 of this chapter when offering and advertising the course and when completing rosters and retaining records;

(2) a proctor is present during the time the video is shown; and

(3) the provider discloses in any advertisement for the course that the instruction will be by supervised video instruction.

(bb) [(ff)] Supervised Video Instruction for required legal course credit. A provider may register a course under subsection (l) [(o)] of this section to be taught by supervised video instruction if the provider:

(1) complies with subsection (aa) [(ee)] (1) - (3) of this section;

(2) ensures that a certified instructor is available to answer students' questions or provide assistance as necessary; and

(3) ensures that students receiving MCE credit for the course passed a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider.

(cc) [(gg)] An applicant must submit an [MCE Form 3B-3,] MCE Course Application Supplement to seek approval to offer an MCE distance learning required legal course and receive written acknowledgment from the commission prior to offering the course. [Distance learning legal courses may be offered on or after July 1, 2005.]

(dd) [(hh)] For a distance learning course, an online course will not be considered complete until credit is awarded by the provider. The provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes the course requirements for credit. The provider shall report the awarding of credit to the commission either by filing a completed [MCE Form 9-8,] Alternative Instructional Methods Reporting Form, signed by the student, or submitting the information contained in the form [MCE Form 9-8] by electronic means acceptable to the commission.

(ee) [(ii)] A provider may use as guest speakers persons who have not been approved as instructors, provided that no more than a total of 50% of the course is taught by the unapproved persons for a registered MCE elective credit course. The commission-registered in-

structor must remain in the classroom during the guest speaker's presentation.

(ff) [~~(jj)~~] A provider may use guest speakers who have not been approved as instructors to conduct a registered MCE elective credit course if:

(1) the provider is an accredited college or university or a professional trade association [~~as defined by §535.62(b) of this chapter~~]; and

(2) the course is supervised and coordinated by a commission-approved instructor who is responsible for verifying the attendance of all who request MCE credit.

§535.72. [~~Mandatory Continuing Education:~~] Presentation of Courses, Advertising and Records.

(a) Course completion roster. A provider offering each MCE course shall file an MCE Course Completion Roster[~~, MCE Form 8-4~~] with the commission within 10 days following completion of the course for licensees who have attended the entire course registered with the commission. Course completion rosters may be transmitted for filing by facsimile machine. The roster [~~MCE Form 8-4~~] shall be signed by an authorized representative of the provider who was in attendance and for whom an authorized signature exemplar is on file with the commission or the instructor for the course. Providers are responsible for the security of the course completion rosters. The commission may not accept signature stamps or unsigned forms. Providers must make every reasonable effort to ensure that no student is certified for full MCE credit who has not attended all class sessions.

(b) Partial credit.

(1) A provider may, but is not required, to permit a student to claim partial credit for a course if:

(A) - (C) (No change.)

(D) the student, by completing an [~~MCE Form 14-0, Individual~~] MCE Partial Credit Request Form, requests credit only for the hours the student completed and the student does not claim credit for an hour that the student did not attend in its entirety except as provided by subsection (c) of this section.

(E) - (F) (No change.)

(2) (No change.)

(c) (No change.)

(d) Proof of distance learning course completion. In a distance learning course, the provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes course requirements for credit. The provider shall report the awarding of credit to the commission. Course credit must be reported either by the provider filing a completed Alternative Instructional Methods Reporting Form [~~MCE Form 9-8,~~] signed by the student, or submitting the information contained in the form [~~MCE Form 9-8~~] by electronic means acceptable to the commission. If the provider chooses to use an electronic reporting process, the process must ensure that only students who complete the course are reported to the commission as receiving course credit and that the process does not compromise the security of commission records.

(e) - (h) (No change.)

(i) Instructor and Course Evaluations. A provider shall make available instructor and course evaluation forms created and approved by the commission for completion by students in every course. The school shall file in the school records any comments by the school's management relevant to instructor or course evaluations. On demand by the commission the school shall produce instructor and course evaluation forms for inspection.

(j) [~~(i)~~] Advertising. Advertising of MCE shall be subject to the following conditions.

(1) A provider applicant may not advertise a specific MCE course or represent in advertising that the applicant is a provider until the applicant has received written approval from the commission for the providership and registered at least one course. A provider applicant may advertise an intention to offer MCE courses if no specific course is described and the advertisement clearly indicates the applicant has not been approved as a provider.

(2) A provider may not advertise a course as acceptable for MCE credit until the provider has received written acknowledgment of registration of the course. A provider may advertise that approval of the course for MCE credit is pending provided that an application has been submitted to the commission and is awaiting approval.

(3) A provider may not offer a course until the provider has received written acknowledgment of registration of the course.

(4) Any advertisement or promotional material used by a provider must indicate the MCE provider's name or assumed business name as reflected in the commission's records and the MCE provider number assigned by the commission. The advertisement or promotional material also must include the specific MCE course numbers and course titles or a statement that MCE course numbers and titles are available from the provider; or, if approval of the course is pending, the course title and a statement that MCE approval is pending. When a provider offers a course that is hosted by another person or organization, the advertisement or promotional material must show clearly that the approved MCE provider is offering the course.

(5) A provider may not publish advertisements which are misleading or which are likely to deceive the public.

(6) Any name a provider uses in advertising must not be deceptively similar to the name of any other approved MCE provider or school accredited by the commission or falsely imply a governmental relationship.

(7) Any written advertisement which contains a fee charged by the provider shall display all fees for the course in the same place in the advertisement and with the same degree of prominence. If a provider requires students to purchase course materials which are not included in the tuition, any such fees must appear in the advertisement of the course.

(k) [~~(j)~~] Record retention.A provider shall maintain the same types of records and for the same period of time as required of schools accredited under Subchapter F of this chapter (relating to Pre-License Education and Examination). Providers shall [~~retain student attendance records for a period of three years following the completion of a course and shall~~] make copies of the records available to former students. A provider may charge a reasonable fee to defray the cost of copying student records. A provider's records must be kept at the location designated in the MCE Provider Application. Providers must obtain prior approval from the commission to change the location at which the provider's records are kept.

(l) [~~(k)~~] Course administration. Providers of MCE courses are responsible to the commission for the conduct and administration of each course presentation, the punctuality of classroom sessions, verification of student attendance, and instructor performance. Providers shall ensure that the required legal courses are administered by instructors in substantially the same manner as disseminated and updated by

the commission. During the presentation of a course, providers may not promote the sale of goods or services.

(m) [~~(l)~~] Updates. If the commission determines that it is in the public interest to update the required legal courses about changes in the law, the commission may require the provider to furnish each student with a copy of the information. The commission also may require the provider to ensure that the provider's instructors include the material in the presentation of the course. The commission shall furnish the provider with a copy of the information and notify the provider that the commission requires compliance with this subsection in a required legal course or any elective course combined with a legal course offered after the provider's receipt of the notice.

(n) [~~(m)~~] Change in ownership. In the event of a change of ownership, the provider must obtain approval from the commission prior to the change, and proposed new owners shall submit a [~~an MCE Form 2-2,~~] Principal Information Form. Providers shall report a change in business name, street or mailing address, email address, person responsible for records or day-to-day operations, or persons authorized to sign MCE forms at least 15 days prior to the desired date of change. Providers shall report any change in refund policy, attorney-in-fact, address of attorney-in-fact or business telephone number as the change occurs.

(o) [~~(n)~~] MCE credit for instructors. Providers may request MCE credit be given to instructors of MCE courses subject to the following guidelines.

(1) The instructors may receive credit for only those portions of the course that they teach by filing a completed [~~MCE Form 11-4,~~] Instructor Credit Request.

(2) The instructors may receive full course credit by attending all of the remainder of the course and signing the course completion roster.

(p) [~~(o)~~] Written policies. Each provider shall establish written policies governing refunds and contingency plans in the event of course cancellation. If the provider cancels a course, the provider shall fully refund all fees collected from students, or at the student's option, the provider may credit the student for another course of equal or greater credit hours.

§535.73. Compliance and Enforcement.

(a) - (b) (No change.)

(c) Audits [~~and evaluations~~]. Commission employees may conduct on-site audits of any course offered by an approved MCE provider. Audits shall be conducted without prior notice to the MCE provider and commission employees may enroll and attend an MCE course without identifying themselves as employees of the commission. [~~Commission employees also may evaluate the effectiveness of course materials or instructors through evaluations submitted by students to the commission.~~] An audit report [~~or evaluations~~] indicating noncompliance with these sections will be treated as a written complaint against the provider or instructor concerned and will be referred to the enforcement division for appropriate resolution.

(d) - (g) (No change.)

§535.74. Additional Information Related to an Application.

(a) The commission may request an applicant for MCE provider, approval of a course, or approval as an instructor to provide additional information related to the application, and the commission may terminate the application without further notice if the applicant fails to provide the information within 60 days after the request was mailed.

(b) Delegation of authority. The commission may authorize its director of education and licensing services division or that person's designee, to determine whether applications for schools, courses, and instructors should be approved.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005025
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER I. LICENSES

22 TAC §§535.91, 535.92, 535.94, 535.96

The Texas Real Estate Commission (TREC or the commission) proposes amendments §535.91, regarding Renewal Notices; §535.92, regarding Renewal: Time for Filing; Satisfaction of Mandatory Continuing Requirements; §535.94, regarding Hearing on Application Disapproval: Probationary Licenses; and new §535.96, regarding Mailing Address and Other Contact Information. TREC is simultaneously proposing the amendments and new rule as part of a comprehensive rule review of 22 TAC Chapter 535.

Section 535.91 is amended to make it consistent with other provisions; parts of subsection (c) are deleted and moved to new §535.96; new subsection (e) is moved from §535.92(m). Section 535.92 is amended to provide consistency with other provisions of the chapter; new subsection (e) is moved from §535.63(c). Section 535.94 is amended to provide consistency with other provisions of the chapter; new subsection (d) clarifies that if a person who has a probationary license renews the license within the one-year late renewal period, the new license is subject to the remaining probationary period from the previous probationary license. New §535.96 regarding Mailing Address and Other Contact Information is moved from §535.91; the new section requires licensees to notify the commission of the licensee's email address.

Generally speaking, the amendments and new rule correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments and new rule are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments and new rule. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments and new rule.

Ms. DeHay also has determined that for each year of the first five years the amendments and new rule are in effect the public benefit anticipated as a result of enforcing the amendments and new rule will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box

12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments and new rule are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.91. Renewal Notices.

(a) Each real estate license expires on the date shown on the face of the license certificate issued to the licensee. The licensee has the responsibility to apply for renewal of a license by making proper application, paying the fee set by the commission and completing MCE [~~mandatory continuing education (MCE)~~] courses within the time periods required by the Act, §1101.455, unless otherwise authorized by §1101.457 of the Act and §535.92 of this subchapter (relating to Renewal: Time for Filing; Satisfaction of Mandatory Continuing Education Requirements).

(b) Except as authorized by §535.92 of this subchapter [~~chapter~~], for the renewal of a license on active status that is not subject to the annual education requirements of §1101.454 of the Act, the license holder must attend during the term of the current license, at least two Commission developed legal courses consisting of a three-hour legal update course and a three-hour legal ethics course to comply with the six legal hours of mandatory continuing education required by §1101.455 of the Act. The remaining nine hours required by §1101.455 of the Act may consist of elective credit courses registered with the commission under Subchapter [~~subchapter~~] G of this chapter (relating to Mandatory Continuing Education).

(c) [~~The commission shall mail a renewal notice for an active broker or an inactive licensee to the last known permanent mailing address of the broker or licensee as shown in the commission's computerized records. The commission shall mail a renewal notice for an active salesperson to the permanent mailing address of the salesperson's sponsoring broker.~~] The commission shall mail a license renewal [~~the~~] notice three months before the expiration of the current license. [~~Each licensee shall furnish a permanent mailing address to the commission and report all subsequent address changes within 10 days after a change of address. If a licensee fails to provide a permanent mailing address, the last known mailing address provided by the licensee will be deemed to be the licensee's permanent mailing address.~~] Failure to receive a license renewal notice does not relieve a licensee of the obligation to renew a license.

(d) A licensee shall provide information requested by the commission in connection with an application to renew a license within 30 days after the commission requests the information. Failure to provide information requested by the commission in connection with a renewal application within the required time is grounds for disciplinary action under [~~the Act,~~] §1101.656 of the Act.

(e) If a licensee is unable to renew a license on the commission's Internet website, the licensee may renew an unexpired license by obtaining a renewal application form from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 and complying with the commission's requirements.

§535.92. Renewal: Time for Filing; Satisfaction of Mandatory Continuing Education Requirements.

(a) - (b) (No change.)

(c) The commission shall advise each licensee of the time period for filing a renewal application and paying the renewal fee by mailing an appropriate notice to the licensee as prescribed by §535.91 of this subchapter (relating [~~title (Relating~~] to Renewal Notices). If the licensee is subject to MCE [~~mandatory continuing education (MCE)~~] requirements, the notice must also contain the number of MCE hours for which the licensee has been given credit and the number of additional MCE hours required for renewal of the license. The commission shall have no obligation to so notify an inactive licensee who has failed to furnish the commission with the person's [~~permanent~~] mailing address and email address or a corporation, limited liability company or partnership that has failed to designate an officer, manager or partner who meets the requirements of the [~~Real Estate License~~] Act [~~(the Act)~~].

(d) A licensee shall renew an unexpired license by accessing the commission's Internet website [~~web site~~], entering the required information on the renewal application form, satisfying applicable education requirements and paying the appropriate fee in accordance with the instructions provided at the website [~~site~~] by the commission.

(e) In order to maintain a license, a salesperson subject to annual education requirements shall furnish documentation to the commission of successful completion of appropriate courses no later than 10 business days prior to the day the salesperson files an application with the commission to renew the salesperson's license.

(f) [~~(e)~~] The commission may not renew a license issued to a business entity [~~corporation, limited liability company or partnership~~] unless the business entity [~~corporation, limited liability company or partnership~~] has designated an officer, manager or partner who meets the requirements of the Act, including satisfaction of MCE requirements. No person may act as designated officer, manager or partner if the person has failed to meet MCE requirements. For the purpose of this section, MCE requirements for the designated officer, manager or partner must be satisfied during the term of any individual broker license held by the officer, manager or partner. A designated partner who is not licensed individually as a broker must complete MCE required for a two-year license within the term of the partnership's license in order to renew the license of the partnership. If the individual real estate broker license of a designated partner expires, the partnership may only renew its license if the designated partner has satisfied MCE requirements that would have been imposed if the license of the designated partner had not expired.

(g) [~~(f)~~] Notwithstanding any provisions of the Act to the contrary, when a licensee in an active status files a timely application to renew a current license and has satisfied all requirements other than the completion of applicable MCE requirements, the commission shall renew the current license in an active status.

(1) If the licensee has not completed MCE requirements prior to the expiration of the current license, the licensee must, within 60 days after the effective date of the new license, pay an additional MCE deferral fee of $200 AND complete the required number of MCE hours.

(2) If, within 15 days after the end of the 60 day period set out in paragraph (1) of this subsection, the commission has not been provided with evidence that the licensee has completed the required number of MCE hours and paid the MCE deferral fee of $200, the renewed license shall be placed on inactive status.

(3) In order to reactivate a license placed on inactive status under this subsection, the licensee must:

(A) provide the commission with evidence that the licensee has completed the required MCE hours;

(B) certify, on a form acceptable to the commission, that the licensee has not engaged in activity requiring a license at any time after the license became inactive;

(C) complete and submit a Request to Return to Active Status Form if a broker or a Salesperson Sponsorship Form if a salesperson and pay the appropriate fee;

(D) if the license was placed on inactive status because the licensee failed to timely pay the $200 MCE deferral fee required by paragraph (1) of this subsection, the licensee must, because the licensee received the benefits of the 60-day deferral, pay the $200 MCE deferral fee; and

(E) pay a late reporting fee of $250.

(4) For the purpose of this section, a renewed license is effective the day following the expiration of the current license. MCE courses completed after expiration of the current license under this provision may not be applied to the following renewal of the license.

(h) [~~(g)~~] Credit will not be given for attendance of the same course more than once during the term of the current license or during the two-year period preceding the filing of an application for late renewal or return to active status. Each licensee attending all sessions of a course shall sign the course completion roster, [~~MCE Form 8-4~~] and provide the information required for each licensee on the form. A real estate licensee may receive partial credit for partial attendance at an MCE elective credit course if the provider permits partial credit and the provider and student verify attendance on the [~~MCE Form 14-0,~~] Individual MCE Partial Credit Request Form. A false statement to the commission concerning attendance at an MCE course will be deemed a violation of the Act and of this section.

(i) [~~(h)~~] A course taken by a Texas licensee to satisfy continuing education requirements of another state may be approved on an individual basis for MCE elective credit in this state upon the commission's determination that:

(1) the Texas licensee held an active real estate license in the other state at the time the course was taken;

(2) the course was approved for continuing education credit for a real estate license by the other state and, if a correspondence course, was offered by an accredited college or university;

(3) the Texas licensee's successful completion of the course has been evidenced by a course completion certificate, a letter from the provider or such other proof as is satisfactory to the commission;

(4) the subject matter of the course was predominately devoted to a subject acceptable for MCE credit in this state; and

(5) the Texas licensee has filed a [~~MCE Form 10-2, MCE~~] Credit Request for an Out of State Course Credit Request, with the commission.

(j) [~~(i)~~] To request MCE elective credit for real estate related courses approved by the State Bar of Texas for minimum continuing legal education participatory credit, a licensee shall file an [~~MCE Form 12-2,~~] Individual MCE Credit Request for State Bar Course.

(k) [~~(j)~~] Real estate licensees may receive MCE elective credit for core real estate courses or core real estate inspection courses that have been approved by TREC or that are accepted by TREC for satisfying educational requirements for obtaining or renewing a license. Core real estate courses must be at least 30 classroom hours in length to be accepted for MCE elective credit.

(l) [~~(k)~~] A course taken by a licensee to obtain any of the following professional designations, or any other real estate related professional designation course deemed worthy by the commission, may be approved on an individual basis for MCE elective credit if the licensee files for credit for the course using [~~MCE Form 15-0~~] Individual MCE Elective Credit Request for Professional Designation Course and provides the Commission with a copy of the course completion certificate.

(1) ABR--Accredited Buyer Representative

(2) CRE--Counselor in Real Estate

(3) CPM--Certified Property Manager

(4) CCIM--Certified Commercial-Investment Member

(5) CRB--Certified Residential Broker

(6) CRS--Certified Residential Specialist

(7) GRI--Graduate, Realtor Institute

(8) IREM--Institute of Real Estate Management

(9) SIOR--Society of Industrial and Office Realtors

(m) [~~(l)~~] A [~~Effective September 1, 2007, a~~] member of the Texas Legislature who is a licensee need only take three (3) hours in legal ethics to the satisfy the legal mandatory continuing education requirements. To obtain an exemption, the licensee must be a current member of the Legislature.

[~~(m) If a licensee is unable to renew a license on the commission's Internet website, the licensee may renew an unexpired license by obtaining a renewal application form from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 and complying with the requirements of this section and §535.91 of this chapter.~~]

§535.94. Hearing on Application Disapproval: Probationary Licenses.

(a) For the purposes of §1101.364 and §1101.505 of the Act and §1102.114 of Chapter 1102 [~~the Real Estate License Act, Texas Government Code, Chapter 1101, (the Act), §§1101.364 and 1101.505~~], "denial of a license" means to disapprove an applicant for a [~~real estate~~] license for failure to comply with the requirement of [~~the Act,~~] §1101.354(2) of the Act, to satisfy the commission as to the applicant's honesty, trustworthiness and integrity, or, if the applicant seeks registration as an easement or right-of-way agent, to disapprove an application for registration under §535.400 of this title (relating to Registration of Easement or Right-of-Way Agents).

(b) If the commission or a SOAH administrative law judge determines that issuance of a probationary license is appropriate, the order entered by the commission with regard to the application must set forth the terms and conditions for the probationary license. Terms and conditions for a probationary license may include any of the following:

(1) - (5) (No change.)

(6) that the probationary licensee comply with any other terms and conditions contained in the order which have been found to be reasonable and appropriate by the commission [~~or commission employee rendering the final decision~~] after due consideration of the circumstances involved in the particular application.

(c) (No change.)

(d) If a license expires prior to the completion of a probationary term and the licensee files a late renewal application as authorized by §535.93 of this subchapter (relating to Late Renewal Applications), any remaining probationary period shall be reinstated effective as of the day following the renewal of the previous license.

§535.96. Mailing Address and other Contact Information.

(a) Each licensee shall furnish a mailing address, phone number, and email address to the commission and shall report all subsequent changes within 10 days after a change of any of the listed contact information. If a licensee fails to update the mailing address, the last known mailing address provided to the commission will be deemed to be the licensee's mailing address.

(b) The commission shall mail a notice or correspondence to an active broker or an inactive licensee to the mailing or email address of the broker or licensee as shown in the commission's records. The commission shall mail a notice or correspondence to an active salesperson to the mailing or email address of the salesperson's sponsoring broker as shown in the commission's records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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SUBCHAPTER L. TERMINATION OF SALESPERSON'S ASSOCIATION WITH SPONSORING BROKER

22 TAC §§535.121 - 535.123

The Texas Real Estate Commission (TREC or the commission) proposes amendments to §535.121, regarding Inactive License; §535.122, regarding Reactivation of License; and §535.123, regarding Inactive Broker Status. TREC is simultaneously proposing the amendments as part of a comprehensive rule review of 22 TAC Chapter 535.

Section 535.121 is amended to clarify that a salesperson's license goes inactive if a broker notifies the commission in writing that the broker is terminating sponsorship of the broker. Subsections (b) and (c) are rewritten for clarity. Section 535.122 is changed to maintain consistency with statutory references and defined terms. Section 535.123 is changed to maintain consistency with statutory references and defined terms; an inactive broker is required to notify the commission if the broker wishes to go on inactive status and provide the commission with information including the broker's telephone number and email address.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments.

Ms. DeHay also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.121. Inactive License.

(a) The license of a salesperson immediately becomes inactive upon each of the following circumstances:

(1) - (2) (No change.)

(3) if the sponsoring broker is a corporation, the dissolution of the corporation or the forfeiture of its charter, which also places the license of the entity on inactive status; [~~or~~]

(4) if the sponsoring broker is a corporation, limited liability company or partnership, the expiration, suspension, revocation or inactivation of the license of the person designated as broker, manager, or partner on the license certificate of the entity, which also places the license of the entity on inactive status; or[~~.~~]

(5) if a broker notifies the commission in writing that the broker no longer sponsors the salesperson.

(b) [~~When the sponsorship of a salesperson ends, the broker shall immediately return the salesperson's license or copy thereof to the commission or otherwise notify the commission that the sponsorship has ended.~~] The commission will no longer consider the broker to sponsor the salesperson upon receipt of the license or upon receipt of a written request from a new sponsoring broker to sponsor the salesperson, whichever first occurs. If the sponsorship has ended because the broker has terminated the sponsorship, the broker shall immediately [~~so~~] notify the salesperson in writing. If the sponsorship has ended because the salesperson has left the sponsorship, the salesperson shall immediately [~~so~~] notify the broker in writing. If the commission receives a request from a broker to sponsor a salesperson shown in the commission's records as sponsored by another broker, the commission shall notify the former broker of the change in sponsorship.

(c) When the sponsorship of a salesperson ends, the broker shall immediately return the salesperson's license or copy thereof to the commission or otherwise notify the commission in writing that the sponsorship has ended. [~~A salesperson's license becomes inactive when a broker returns a salesperson's license to the commission until a new sponsorship form for the salesperson is mailed or delivered to the commission.~~]

§535.122. Reactivation of License.

(a) (No change.)

(b) When a salesperson whose license status is inactive enters the sponsorship of a broker and the salesperson is subject to MCE [~~mandatory continuing education (MCE)~~] requirements, the salesperson is not returned to active status until MCE requirements are satisfied

and the commission has received documentation of course completion in a form satisfactory to the commission. A salesperson whose original application or renewal application was subject to educational requirements imposed by the [~~Real Estate License~~] Act[~~, Texas Occupations Code, Chapter 1101 (Act)~~], §1101.358 and §1101.454, is not subject to MCE requirements as a condition of returning to active status during the term of the license issued from the original application or renewal application.

§535.123. Inactive Broker Status.

(a) (No change.)

(b) To be placed on inactive status, a broker must do the following:

(1) apply to the commission on a form approved by the commission for that purpose or by a letter providing the broker's name, license number and current mailing address, telephone number and email address;

(2) - (3) (No change.)

(c) To return to active status a broker who has been placed on inactive status must apply to the commission for return to active status on a form approved by the commission, pay the appropriate fee and satisfy MCE [~~mandatory continuing education (MCE)~~] requirements specified in [~~Texas Occupations Code, Chapter 1101, (the Act)~~] §1101.455 of the Act and the Rules [~~of the Texas Real Estate Commission~~].

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005027
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER M. NONRESIDENTS

22 TAC §535.131, §535.132

The Texas Real Estate Commission (TREC or the commission) proposes amendments to §535.131, regarding Unlawful Conduct; Splitting Fees and §535.132, regarding Eligibility of Licensure. Section 535.131 is amended to delete subsections (b) - (d) as the subjects are otherwise covered in definitions under §535.1 or in new §535.4 regarding License Required. Section 535.132 is amended to delete the definition for "state" which was moved to §535.1. TREC is simultaneously proposing the amendments as part of a comprehensive rule review of 22 TAC Chapter 535.

Generally speaking, the amendments correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments.

Ms. DeHay also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.131. Unlawful Conduct; Splitting Fees.

(a) The [~~Real Estate License~~] Act, [~~Texas Occupations Code, Chapter 1101, (the Act)~~] permits Texas-licensed brokers to cooperate with and share earned commissions with persons licensed as brokers in other states, but all negotiations physically conducted within Texas must be handled by Texas licensees.

[~~(b) As used in §1101.651 of the Act, the word "state" refers to the states, territories, and possessions of the United States and any foreign country or governmental subdivision thereof.~~]

[~~(c) An unlicensed person may share in the income earned by a real estate brokerage operation if the person engages in no acts for which a license is required and does not lead the public to believe that the person is in the real estate brokerage business.~~]

[~~(d) If a member of a partnership or an officer of a corporation does not engage in acts for which a license is required, the person is not required to be licensed and may share in the income earned by the partnership or corporation.~~]

(b) [~~(e)~~] A resident of a foreign state that does not require a person to be licensed to act as a real estate broker is considered to be licensed as a broker for the purposes of [~~the Act,~~] §1101.651 of the Act, if the person complies with the law of the foreign state and practices there as a real estate broker.

§535.132. Eligibility for Licensure.

(a) A person residing in another state may apply for a license under the provisions of [~~Texas Occupations Code, Chapter 1101, (the Act),~~] Subchapter H of the Act and this section if the person:

(1) - (2) (No change.)

(b) - (c) (No change.)

[~~(d) The word "state" refers to the states, territories, and possessions of the United States and any foreign country or governmental subdivision thereof.~~]

(d) [~~(e)~~] To be eligible to receive a license and maintain an active license, a limited liability company or corporation created or chartered in another state must designate a person to act for it who meets the requirements of [~~the Act,~~] §1101.453 of the Act, although the designated person is not required to be a resident of Texas. Foreign corporations and limited liability companies also must be permitted to

engage in business in this state to receive a Texas real estate broker license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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SUBCHAPTER N. SUSPENSION AND REVOCATION OF LICENSURE

22 TAC §§535.141, 535.143 - 535.149, 535.153, 535.154, 535.159 - 535.161

The Texas Real Estate Commission (TREC or the commission) proposes amendments to §535.141, regarding Initiation of Investigation; §535.143, regarding Fraudulent Procurement of License; §535.144, regarding When Acquiring or Disposing of Own Property or Property of Spouse, Parent or Child; §535.145, regarding False Promise; §535.146, regarding Failure to Properly Account for Money; Commingling; §535.147, regarding Splitting Fee with Unlicensed Person; §535.148, regarding Receiving an Undisclosed Commission or Rebate; §535.149, regarding Lottery or Deceptive Trade Practice; §535.153, regarding Violating an Exclusive Agency; new §535.154, regarding Advertising; amendments to §535.159, regarding Failing to Properly Deposit Escrow Monies; §535.160, regarding Failing to Properly Disburse Escrow Money; and §535.161, regarding Failing to Provide Information. TREC is simultaneously proposing the amendments and new rule as part of a comprehensive rule review of 22 TAC Chapter 535.

Generally speaking, the amendments and new rule correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

The amendments to §535.141 streamline the section, update the cites and clarify existing subsections; subsection (h) is amended to include advertising in the laundry list activities that a licensee may not engage in while the person's license is under suspension; subsection (i)(3) and (4) are added to include home inspectors; subsection (j) is added to address matters relating to automatic suspension of a license for violating a term or condition of an agreed probated revocation or suspension.

The amendments to §535.144 clarify that a licensee must disclose the information required by §1101.652(a)(3) in writing.

The amendments to §535.146 clarify existing requirements that apply to maintenance of trust accounts, including that a broker is ultimately responsible for compliance with the trust account requirements in the Act and Rules; subsection (h) is amended to require a broker to notify all parties in writing when a broker makes a disbursement to which all parties have not expressly agreed to in writing; new subsection (k) clarifies that a broker may deposit and maintain additional amounts in a trust account to cover bank service fees.

Subsection (a) of §535.147 is deleted and moved to the definitions in §535.1; new subsection (a) clarifies that a licensee may not share a commission with an unlicensed person except as provided by the Act or Rules; new subsection (b) authorizes an unlicensed person to share in the income earned by a licensee as long as the person does not engage in real estate brokerage activity; new subsection (c) clarifies that a broker or salesperson may not share a commission with an unlicensed corporation or limited liability company created by a licensee for the purpose of collecting a commission or fees on behalf of the licensee.

New subsection (c) is added to §535.148 to prohibit a licensee from entering into contracts with service providers which prohibits a licensee from entering into or offering similar service on behalf of a competing service provider; new subsection (d) prohibits contingent fee arrangements where the licensee accepts a fee that is contingent upon a party purchasing a contract or services from a specific service provider; new subsection (e) adopts by a reference RSC-1, Disclosure of Relationship with Residential Service Company which licensees are required to use to disclose compensation for services provided to or on behalf of a residential service company.

The amendments to §535.149 clarify the definition of "lottery" and "deceptive practices."

Proposed new §535.154 replaces existing §535.154. Subsection (a) provides a definition of "advertisement"; subsection (b) clarifies what communications are not considered advertisements for purposes of the Act and Rules; subsection (c) requires salespersons and brokers to clearly and conspicuously, as defined in the subsection, include the broker's name and license number in all advertising placed by or on behalf of the licensee, when the licensee is acting either as an agent or a principal, by a specified effective date; subsection (d) provides a laundry list of types of advertising that are considered deceptive and misleading; subsection (n) prohibits licensees from advertising information regarding service providers that ranks the providers unless the ranking is based on disclosed objective criteria; subsection (o) prohibits licensees from advertising that a licensee offers, sponsors, or conducts commission approved courses unless the licensee is approved to offer the courses; the remaining subsections restate existing advertising rules.

Amendments to §§535.143, 535.145, 535.153, and 535.159 - 535.161 clarify and streamline existing provisions.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendments and new rule are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments and new rule. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendments and new rule.

Ms. DeHay also has determined that for each year of the first five years the amendments and new rule are in effect the public benefit anticipated as a result of enforcing the amendments and new rule will be more streamlined, consistent and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments and new rule are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Es-

tate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.141. Initiation of Investigation.

(a) As used in this section, the term "licensee" includes a person licensed or registered under the Act [~~Texas Occupations Code Chapters 1101~~] and Chapter 1102 and the term "license" includes a registration issued by the commission.

(b) Except as authorized under Texas Government Code §402.031(b), the commission may not conduct an undercover or covert investigation of a person [~~licensed~~] under the Act and Chapter [~~Texas Occupations Code Chapters 1101 or~~] 1102. Notwithstanding §1101.204(d), the commission shall not disclose to any person who is the subject of an investigation involving [~~of~~] fraudulent activity, that the activity has been reported to the proper authority pursuant to Texas Government Code §402.031.

(c) [~~A real estate broker is responsible for all acts and conduct performed by a real estate salesperson associated with or acting for the broker.~~] A complaint which names a licensed real estate salesperson as the subject of the complaint but does not specifically name the salesperson's sponsoring broker, is a complaint against the broker sponsoring the salesperson at the time of any alleged violation for the limited purposes of determining the broker's involvement in any alleged violation and whether the broker fulfilled his or her professional responsibilities [~~to the commission, members of the public, and his or her clients,~~] provided the complaint concerns the conduct of the salesperson as an agent for the broker.

(d) The broker [~~person~~] designated by a licensed business entity [~~corporation, limited liability company or partnership~~] to act as its officer, manager or partner is responsible for all real estate brokerage activities [~~acts and conduct as a real estate broker~~] performed by, on behalf of, or through the business entity. A complaint which names a business entity [~~corporation, limited liability company or partnership~~] licensed as a broker as the subject of the complaint but which does not specifically name the broker designated as the officer, manager or partner of the business entity, is a complaint against the broker acting as the designated officer, manager or partner at the time of any alleged violation for the limited purposes of determining the designated broker's [~~person's~~] involvement in any alleged violation and whether the designated broker [~~person~~] fulfilled his or her professional responsibilities [~~to the commission, members of the public, and his or her clients~~]. A complaint which names a salesperson sponsored by a licensed business entity [~~corporation, limited liability company or partnership~~] but which does not specifically name the designated broker [~~person~~] of the business entity is a complaint against the designated broker [~~who was acting as designated person~~] at the time of any alleged violation by the salesperson for the limited purposes of determining the designated broker's [~~person's~~] involvement in any alleged violation and whether the designated broker [~~person~~] fulfilled his or her professional responsibilities [~~to the commission, members of the public, and his or her clients,~~] provided the complaint concerns the conduct of the salesperson as an agent of the business entity.

(e) Once a written and signed complaint has been filed with the commission, the commission has jurisdiction to consider, investigate and take action based on the complaint. Complaints may be withdrawn only with the consent of the commission.

(f) If information obtained during the course [~~by the commission in the course of the investigation of a complaint or as a result~~] of an investigation of a complaint reveals [~~authorized by the members of the commission constitutes~~] reasonable cause to believe the respondents to the complaint may have committed other violations of the Act or a rule of the commission, no additional authorization shall be required [~~for the commission~~] to investigate and take [~~appropriate~~] action based upon [~~on~~] the information.

(g) (No change.)

(h) A person whose license has been suspended may not during the period of any suspension:

(1) perform, [~~or~~] attempt to perform, or advertise to perform any act for which a license is required by the Act or Rules [~~law or commission rule~~]; or

(2) unless instructed otherwise in writing by both [~~the~~] principals to the transaction, continue to hold any trust funds received in a real estate transaction in which the person acted as a [~~real estate~~] broker or salesperson.

(i) A person whose license is subject to an order suspending the license must prior to the suspension taking effect:

(1) if the person is a [~~real estate~~] salesperson, notify his or her sponsoring broker in writing that his or her license will be suspended;

(2) if the person is a [~~real estate~~] broker, notify in writing any salespersons he or she sponsors, or any corporation, limited liability company or partnership for which the person is designated as an officer, manager or partner that:

(A) his or her [~~real estate~~] broker license will be suspended; and[~~,~~]

(B) once the suspension is effective any salesperson he or she sponsors or who is sponsored by the corporation, limited liability company or partnership will not be authorized to engage in real estate brokerage unless the salespersons associate with another broker and file a change of sponsorship with the commission or the business entity designates a new broker [~~person~~] and files a change of designated officer, manager or partner with the commission;

(3) If the person is an apprentice inspector or real estate inspector, notify his or her sponsoring professional inspector in writing that his or her license will be suspended;

(4) if the person is a professional inspector, notify in writing any apprentice or real estate inspectors he or she sponsors that:

(A) his or her professional inspector license will be suspended; and

(B) once the suspension is effective any apprentice or real estate inspectors he or she sponsors will not be authorized to inspect any real property unless the apprentice or real estate inspectors associate with another professional inspector and file a change of sponsorship with the commission.

(5) [~~(3)~~] if the person has a contractual obligation to perform services for which a license is required by law or commission rule, notify in writing all other parties to the contract that the services cannot be performed during [~~due to~~] the suspension;

(6) [~~(4)~~] if the person is a [~~real estate~~] salesperson and is directly involved in any real estate transaction in which the salesperson acts as an agent, notify in writing all other parties, including principals and other [~~real estate~~] brokers, that the person cannot continue performing real estate brokerage services during [~~due to~~] the suspension; and

(7) [~~(5)~~] if the person holds money in trust in any transaction in which the person is acting as a [~~real estate~~] broker, remit such money in accordance with the instructions of the principals.

(j) If, in conjunction with an application or disciplinary matter, an applicant or licensee agrees to automatic suspension or revocation of his or her license for failing to comply with an administrative term or requirement of an agreed order such as payment of a penalty or completion of coursework, the license may be automatically suspended or revoked with no further action by the commission.

(k) [~~(j)~~] A licensee [~~person~~] may not assign to another licensee a listing agreement, buyer's representation agreement or other personal service contract to which the licensee [~~person~~] is a party and which obligates the licensee [~~person~~] to perform acts for which a license is required without first obtaining the written consent of the other parties to the contract.

§535.143. Fraudulent Procurement of License.

A violation of [~~Texas Occupations Code~~], §1101.652(a)(2) of the Act[~~,~~] occurs if an applicant, including a designated broker for any business entity eligible for licensure under this chapter, [~~for licensure for the applicant or a salesperson~~] omits material information or makes material misstatements, written or oral, in connection with the filing of an application or renewal application to obtain licensure. This does not include an unintentional mistake of fact the determination of which is within the discretion of the commission and subject to judicial review. [~~; however, a broker submitting an application as sponsor of a proposed salesperson shall has an affirmative duty to ascertain that all information called for in the application is given and is true, correct and complete, whether the application is filled out by the broker or the prospective salesperson.~~]

§535.144. When Acquiring or Disposing of Own Property or Property of Spouse, Parent or Child.

(a) For purposes of §1101.652(a)(3) of the Act [~~§1101.652(a)(3), Texas Occupations Code~~] "a person related to the license holder within the first degree by consanguinity" means a license holder's parent or child.

(b) A licensee, when engaging in a real estate transaction on his or her own behalf, on behalf of a business entity in which the licensee is more than a 10% owner, or on behalf of the licensee's spouse, parent, or child, is obligated to disclose in writing to [~~inform~~] any person with whom the licensee deals that he or she is a licensed real estate broker or salesperson acting on his or her own behalf or on behalf of the licensee's spouse, parent[~~,~~] or child [~~either by disclosure~~] in any contract of sale or rental agreement[~~,~~] or [~~by disclosure~~] in any other writing given prior to entering into any contract of sale [~~sales~~] or rental agreement. A licensee shall not use the licensee's expertise to the disadvantage of a person with whom the licensee deals.

§535.145. False Promise.

For purposes of §1101.652(a)(5) of the Act "false [~~"False~~] promise" includes both oral and written promises. The fact that a written contract between the parties to a real estate transaction does not recite a promise made by a real estate licensee to one of the parties or that a person did not detrimentally rely on the false promise will not prevent the commission from determining that a false promise was made. In determining [~~When deciding~~] whether this section has been violated, neither a written contractual provision disclaiming oral representations nor the Texas Rules of Evidence Rule 1004, the parol evidence rule, shall prevent the commission from considering oral promises made by a licensee.

§535.146. Failure to Properly Account for Money; Commingling.

(a) A broker who maintains trust funds shall either keep a separate trust account or use an escrow agent for all such trust funds. [~~For the purposes of this section, "trust account" includes any trust, escrow, custodial, property management account, or other account in which a licensee holds money on behalf of another person.~~]

(b) A broker may designate a salesperson as an authorized signatory on any trust account; however, the broker shall be solely responsible and accountable for all trust funds received by the broker and all deposits to or disbursements from the trust account.

(c) A salesperson shall immediately deliver to the sponsoring broker any trust funds received in connection with a real estate transaction not otherwise deposited with a title company.

(d) [~~(b)~~] A licensee maintaining a trust account shall retain for a period of four years a documentary record of each deposit or withdrawal from the account.

(e) A licensee shall not commingle trust funds with personal funds or other non-trust funds and shall not deposit or maintain trust funds in a personal account or any kind of business account except a specifically designated trust account in the name of the sponsoring broker.

(f) [~~(c)~~] If a licensee accepts money belonging to others, the licensee holds such money in a fiduciary capacity.

(g) If any or all of the parties to a real estate transaction make demand for the money, the licensee must, within a reasonable time, properly account for or remit the money. "Reasonable time" means within 30 days after demand is made for an accounting or for remittance of money belonging to others.

[~~(d)~~] "Properly account for or remit" is defined as the licensee's obligation [~~means~~] to pay the money to the party or parties entitled to the money if it can be reasonably determined to which party or parties the money should be paid. A licensee may pay the money into the registry of a court and interplead the parties if it cannot be reasonably determined to which party or parties the money should be paid.

(h) [~~(e)~~] If, by written agreement of the parties to the real estate transaction, the licensee holding money belonging to others has the right to require the receipt, release and authorization in writing from all parties before paying the money to any party or parties, and if the licensee chooses to exercise that right, "properly account for or remit" means to furnish every party with a written statement requesting such receipt, release and authorization and detailing the amount and place of custody of the money and to pay the money to the party or parties in accordance with the receipts, releases and authorizations, if obtained. When a broker makes a disbursement to which all parties to the contract have not expressly agreed in writing, the broker must immediately notify all parties in writing of the disbursement. A licensee may pay the money into the registry of a court and interplead the parties if the receipts, releases and authorizations that the licensee has the right to require cannot be obtained.

(i) [~~(f)~~] If trust funds are [~~escrow or other money belonging to another is~~] held by a licensee, they [~~it~~] must be maintained in [~~a~~] the broker's trust account. Placing such money in a licensee's operating account is prima facie evidence of [~~constitutes~~] commingling.

(j) [~~(g)~~] If a licensee acquires ownership of money, including entitlement to a real estate commission for the real estate transaction, held in the licensee's trust account that was originally held in trust for another in connection with the real estate transaction, such money must be removed from the trust account within a reasonable time. "Reasonable time" in this context means within 30 days after the licensee acquires ownership of the money.

(k) [~~(h)~~] The balance of a broker's trust account shall at all times equal the total of the trust funds received for which the broker is accountable, provided, however, the broker may deposit and maintain a reasonable amount of funds in the trust account to cover bank service fees, including fees charged for insufficient funds. Detailed records must be kept for any funds deposited under this exception. Paying operating expenses or making withdrawals from a broker's trust account for any purpose other than proper disbursement of money held in trust is prima facie evidence of commingling money held in trust with the broker's own funds.

§535.147. Splitting Fee with Unlicensed Person.

(a) Except as otherwise provided by the Act or Rules, a broker or salesperson may not share a commission or fees with any person who engages in acts for which a license is required and is not actively licensed as a broker or salesperson.

(b) An unlicensed person may share in the income earned by a business entity licensed as a broker or exempted from the licensing requirements under the Act if the person engages in no acts for which a license is required and does not lead the public to believe that the person is in the real estate brokerage business.

(c) A broker or salesperson may not share a commission or fees with an unlicensed corporation or limited liability company created by a licensee for the purpose of collecting a commission or fees on behalf of the licensee.

[~~(a) "Any other state" means the states, territories, and possessions of the United States and any foreign country or governmental subdivision thereof.~~]

[~~(b) "Commission or fees" includes any form of compensation received for engaging in an act for which a license is required by Texas Occupations Code, Chapter 1101.~~]

(d) [~~(c)~~] It is not a violation of this section for a licensee to rebate or pay a portion of the licensee's commission or fees [~~fee or commission~~] to a party in the transaction. However, no commission or fees may be paid to any party to the transaction in a manner which would mislead a broker, lender, title company or governmental agency regarding the real estate transaction or the financial resources or obligations of the buyer. A licensee who intends to pay a portion of the licensee's fee or commission to a party the licensee does not represent must obtain the consent of the party represented by the licensee prior to making the payment.

§535.148. Receiving an Undisclosed Commission or Rebate.

(a) (No change.)

(b) If a party [~~person~~] the licensee does not represent agrees to pay a service provider in the transaction, the licensee must also obtain the consent of that party [~~person~~] to accept a fee, commission or rebate from the service provider. As used in this section [~~subsection~~], the term "service provider" does not include a person acting in the capacity of a real estate broker or salesperson.

(c) A licensee may not enter into a contract or agreement with a service provider to a real estate transaction in which the licensee represents one or both of the parties if, pursuant to the contract or agreement:

(1) the licensee provides services for or on behalf of the service provider; and

(2) the contract or agreement prohibits the licensee from offering similar services for or on behalf of a competing service provider.

(d) A licensee may not accept a fee or payment for services provided for or on behalf of a service provider to a real estate transaction the payment of which is contingent upon a party to the real estate transaction purchasing a contract or services from the service provider.

(e) A licensee must use TREC Form RSC-1, Disclosure of Relationship with Residential Service Company, to disclose to a party to a real estate transaction in which the licensee represents one or both of the parties any payments received for services provided for or on behalf of a residential service company licensed under Texas Occupations Code Chapter 1303.

(f) The Texas Real Estate Commission adopts by reference TREC Form No. RSC-1, Disclosure of Relationship with Residential Service Company, approved by the commission for use by licensees to disclose payments received from a resident service company. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§535.149. Lottery or Deceptive Trade Practice.

(a) For the purposes of §1101.652(b)(14) of the Act, the [~~The~~] elements of a "lottery" are the award or distribution of a prize or prizes by chance and the payment of consideration for the opportunity to win the prize.

(b) The giving of gifts as an inducement for prospective clients does not violate [~~is not violative of~~] this section or §1101.652(b)(14) of the Act, but licensees when procuring prospects must otherwise comply with the provisions of §535.20 of this chapter (relating to Referrals From Unlicensed Persons).

(c) "Deceptive practices" include, but are not limited to the acts described in the Texas Business and Commerce Code §17.46, done in a manner defined in that section.

§535.153. Violating an Exclusive Agency.

Although a licensee, including one acting as agent for a prospective buyer or prospective tenant, may not attempt to negotiate a sale, exchange, lease, or rental of property under exclusive listing with another broker, [~~Texas Occupations Code,~~] §1101.652(b)(22) of the Act does not prohibit a licensee from soliciting a listing from the owner while the owner's property is subject to an exclusive listing with another broker.

§535.154. Advertising.

(a) For the purposes of this section, an "advertisement" is a written or oral statement or communication by or on behalf of a licensee which induces or attempts to induce a member of the public to use the services of the licensee or service provider. The term "advertisement" includes, but is not limited to, all publications, radio or television broadcasts, all electronic media including email, text messages, social networking websites, and the Internet, business stationery, business cards, signs and billboards. The provisions of this section apply to all advertisements by or on behalf of a licensee unless the context of a particular provision indicates that it is intended to apply to a specific form of advertisement.

(b) The following information is not considered an advertisement or advertising:

(1) a communication from a licensee to a member of the public after the member of the public agreed for the licensee to provide services, provided the first communication from the licensee contains the information required by this section; or

(2) real estate information, including listings, available to the public on a licensee's website, extranet or similar site that is behind a firewall or similar filtering software which requires a password or registration to access that information.

(c) An advertisement placed by a salesperson acting on behalf of another or as a principal must contain language that clearly and conspicuously identifies the name and license number of the salesperson's sponsoring broker. An advertisement placed by a broker must include the broker's license number in a clear and conspicuous manner. The commission shall consider language as clear and conspicuous if it is in at least the same size of type or print as the largest telephone number or contact information in the advertisement. The commission shall consider advertisements not to be in compliance with this subsection if the required language is in print or type so small that it cannot be easily read from the street or sidewalk. The requirements of this subsection regarding a brokers name applies to salespersons' advertisements on or after July 1, 2011. The requirements regarding the broker's license number applies to all advertisements on or after January 1, 2012.

(d) For purposes of this section and §1101.652(b)(23) of the Act, deceptive or misleading advertising includes, but is not limited to, the following:

(1) advertising that is inaccurate in any material fact or in any way misrepresents any property, terms, values, services, or policies;

(2) advertising a property that is subject to an exclusive listing agreement without the permission of the listing broker and without disclosing the name of the listing broker unless the listing broker has expressly agreed to waive disclosure;

(3) failing to remove an advertisement about a listed property within a reasonable time after closing or termination of a listing agreement, unless the status is included in the advertisement;

(4) an advertisement by a salesperson which identifies the salesperson as a broker; or

(5) advertising a property in a manner that creates a reasonable likelihood of confusion regarding the permitted use of the property.

(e) A broker, individually or as the designated officer, manager or partner of a business entity licensed as a broker shall notify the commission in writing within 30 days after the broker, or a salesperson sponsored by the broker, starts or stops using a name in business other than the name in which the person is licensed.

(f) An advertisement placed by a licensee must include a designation such as "agent," "broker" or a trade association name that serves clearly to identify the advertiser as a real estate agent.

(g) Except as provided by subsection (h) of this section, a broker or salesperson may not place an advertisement that in any way:

(1) implies that a salesperson is the person responsible for the operation of a real estate brokerage business; or

(2) causes a member of the public to believe that a person not authorized to conduct real estate brokerage is personally engaged in real estate brokerage.

(h) A corporation or limited liability company licensed as a real estate broker may do business in the name in which it was chartered or registered by the Office of the Secretary of State.

(i) A real estate licensee placing an advertisement on the Internet, electronic bulletin board or the like must include on each page on which the licensee's advertisement appears any information required by this section and the disclosure relating to the advertiser's status as a broker or agent required by §1101.652(b)(23) of the Act. For purposes of this subsection, "page" means each html document of a website, which may include several screens of information that are viewed by scrolling down to the end of the document.

(j) A real estate licensee placing an advertisement by using any electronic communication, including but not limited to email and email discussion groups, text messages, and social networking websites must include in the communication and in any attachment which is an advertisement the information required by this section and the disclosure relating to the advertiser's status as a broker or agent required by §1101.652(b)(23) of the Act.

(k) An advertisement placed where it is likely to attract the attention of passing motorists or pedestrians must contain language that clearly and conspicuously identifies as a real estate broker or agent the person publishing the advertisement. This subsection does not apply to signs placed on real property listed for sale, rental or lease with the broker who has placed the sign provided the signs otherwise comply with this section and the Act.

(l) An advertisement containing an offer to rebate to a party a portion of a licensee's commission must disclose that payment of the rebate is subject to the consent of the party the licensee represents in the transaction. If payment of the rebate is contingent upon a party's use of a selected service provider, the advertisement also must contain a disclosure that payment of the rebate is subject to restrictions.

(m) If an advertisement offers, recommends or promotes the use of services of a real estate service provider other than the licensee and the licensee expects to receive compensation if a party uses those services, the advertisement must contain a disclosure that the licensee may receive compensation from the service provider.

(n) A licensee may not advertise information regarding service providers that ranks such providers unless the ranking is based on disclosed objective criteria.

(o) A licensee may not advertise that such licensee offers, sponsors, or conducts commission approved courses in conjunction with an approved school or other approved organization unless the licensee is approved by the Commission to offer such courses.

§535.159. Failing to Properly Deposit Escrow Monies.

(a) A broker is not required to maintain a trust account unless the broker undertakes to accept trust funds [~~monies~~] belonging to others.

(b) When money is deposited with a broker to be held in escrow, the broker becomes the trustee accountable [~~both~~] to the party making the deposit and to the party for whose benefit said trust funds are deposited.

(c) (No change.)

(d) Nonresident brokers acting as real estate agents in Texas who accept trust funds [~~money~~] as escrow agents must deposit said funds in a [~~custodial,~~] trust [~~or escrow~~] account at a banking institution or title company authorized to do business in Texas.

(e) It is permissible for a broker to establish a savings account as a trust [~~an escrow~~] account, provided said funds may be withdrawn at the appropriate time for disbursal. In the absence of an agreement to the contrary signed by the person depositing the funds with the broker, any interest earned on a savings account must be distributed to the person or persons who are the equitable owners of the funds during the time the interest is earned.

(f) A salesperson may not maintain a trust [~~an escrow~~] account or act as an escrow agent. Any money received by a real estate salesperson, [~~which is~~] to be held in trust pursuant to a real estate transaction, must be delivered to the salesperson's sponsoring broker to be deposited in accordance with the agreement of the principals in the transaction.

(g) [~~A trust or escrow account may contain any money held by the real estate broker as a trustee for another pursuant to a real estate transaction in which the broker acted as agent, provided the principals have agreed that the broker is to act as trustee.~~] A broker may, but is not required to, maintain separate trust accounts for earnest money deposits, security deposits received for the management of rental property, and for other trust funds [~~money received in trust~~].

(h) If a broker maintains a trust [~~or escrow~~] account, that account must be clearly identified as a trust account [~~such~~].

(i) (No change.)

(j) If trust funds [~~money~~] held [~~in trust~~] by a broker are deposited [~~is held~~] in a noninterest bearing account, the broker is not liable for interest or for charges on the funds unless there is an agreement to the contrary.

(k) If a broker accepts a check as escrow agent and later finds that such check has been dishonored by the bank on which it was drawn, the broker shall immediately notify all parties to the transaction in writing.

§535.160. Failing to Properly Disburse Escrow Money.

A broker shall make no disbursal from the broker's trust [~~escrow~~] account except in accordance with the agreement under which the money was received.

§535.161. Failing to Provide Information.

For the purposes of §1101.652(a)(5) of the Act, [~~As used in this section~~] "reasonable time" means 10 working days from receipt of a request made by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 465-3926

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22 TAC §535.154

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Real Estate Commission (TREC or the commission) proposes the repeal of §535.154 regarding Misleading Advertising. The repeal is proposed because the subject addressed in the section is covered in new proposed amendments to Subchapter N which TREC is simultaneously proposing as part of a comprehensive rule review of 22 TAC Chapter 535. As the reformation of the subchapters will comprehensively address the subjects of the proposed repealed rule, repeal of the rule is necessary to avoid confusion and repetition.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeal. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the repeal.

Ms. DeHay also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.154. Misleading Advertising.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER O. HEARING ON SUSPENSION OR REVOCATION OF LICENSURE

22 TAC §535.171

The Texas Real Estate Commission (TREC or the commission) proposes an amendment to §535.171, regarding Hearing: Subpoenas and Fees. New subsection (c) addresses cases in which a party requests issuance of a subpoena and requires the party to pay for the costs of issuing the subpoena.

Generally speaking, the amendment corrects typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendment. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendment.

Ms. DeHay also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.171. Hearing: Subpoenas and Fees.

(a) In addition to the provisions of the Texas Government Code §2001.089, process [~~Process~~] may be served by an employee of the Texas Real Estate Commission if that person is designated by the commission.

(b) A witness or deponent who is not a party and who is subpoenaed or otherwise compelled to attend any hearing or proceeding to give a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purposes of the proceeding is entitled to receive mileage of $.20 a mile for going to and returning from the place of the hearing or where the deposition is taken, if the place is more than 25 miles from the person's place of residence and a fee of $20 a day for each day or part of a day the person is necessarily present as a witness or deponent.

(c) Pursuant to Texas Government Code §2001.089, a party who requests the issuance of a subpoena for a witness or deponent under subsection (b) of this section, must deposit an amount with the Texas Real Estate Commission that will reasonably ensure payment of the amounts estimated to accrue under subsection (b) of this section and Texas Government Code §2001.103.

(d) [~~(c)~~] Pursuant to Texas Government Code §2001.177, a party seeking judicial review of a final decision of the Texas Real Estate Commission in a contested case shall pay all costs of preparing the original or certified copy of a record of the contested case proceedings.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER P. PENALTY FOR UNLICENSED ACTIVITY

22 TAC §535.181

The Texas Real Estate Commission (TREC or the commission) proposes an amendment to §535.181, regarding Penalty. Section 535.181 is amended to clarify that the commission may, in addition to the existing powers, impose an administrative penalty and issue an order to cease and desist.

Generally speaking, the amendment corrects typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendment. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendment.

Ms. DeHay also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.181. Penalty.

If the Texas Real Estate Commission receives information that indicates that a person has engaged in unlicensed activity, it shall conduct an investigation to determine if such information is accurate. If the information establishes evidence to indicate a probable violation of the Act, the commission may impose an administrative penalty; issue an order to cease and desist; file a complaint, alleging unlicensed activity, with the appropriate law enforcement official; or take such other action as may be necessary and proper.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

22 TAC §535.191

The Texas Real Estate Commission (TREC or the commission) proposes an amendment to §535.191, regarding Schedule of Administrative Penalties. Section 535.191 is amended to add additional provisions that apply to the schedule.

Generally speaking, the amendment corrects typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendment. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendment.

Ms. DeHay also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.191. Schedule of Administrative Penalties.

(a) The commission may suspend or revoke a license or take other disciplinary action authorized by Chapter 1101 of the Act in addition to assessing the administrative penalties set forth in this section.

(b) The administrative penalties set forth in this section take into consideration all of the criteria listed in §1101.702(b) of the Act [~~Texas Occupations Code~~].

(c) An administrative penalty range of $100 - $1,500 per violation per day may be assessed for violations of the following sections of the Act and Rules [~~Texas Occupations and Administrative Codes~~]:

(1) §1101.552;

(2) [~~(1)~~] §1101.652(a)(8);

(3) [~~(2)~~] §1101.652(b)(23);

(4) [~~(3)~~] §1101.652(b)(29);

[~~(4) 22 TAC §535.92(f);~~]

(5) 22 TAC §535.91(c); [~~and~~]

(6) 22 TAC §535.144; and[~~.~~]

(7) 22 TAC §535.154.

(d) An administrative penalty range of $500 - $3,000 per violation per day may be assessed for violations of the following sections of the Act and Rules [~~Texas Occupations Code~~]:

(1) §1101.652(a)(4) - (7);

(2) §1101.652(b)(1);

(3) §1101.652(b)(7) - (8);

[~~(4) §1101.652(b)(8);~~]

(4) [~~(5)~~] §1101.652(b)[~~(10) -~~] (12);

(5) [~~(6)~~] §1101.652(b)(14);

(6) [~~(7)~~] §1101.652(b)(22);

(7) [~~(8)~~] §1101.652(b)[~~(26) -~~] (28);

(8) [~~(9)~~] §1101.652(b)(30) - (31); and

(9) [~~(10)~~] §1101.654(a).

(e) An administrative penalty range of $1,000 - $5,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

(1) §1101.351[~~(a)~~];

(2) §1101.366(d);

(3) §1101.557(b);

(4) §1101.558(b) - (c);

(5) §1101.559(a), (c);

(6) §1101.560;

(7) §1101.561(b);

(8) §1101.615;

(9) §1101.651;

(10) [~~(2)~~] §1101.652(a)(2) - (3);

(11) [~~(3)~~] §1101.652(a)(9) - (10);

(12) [~~(4)~~] §1101.652(b)(2) - (6);

(13) [~~(5)~~] §1101.652(b)(9) - (11);

(14) [~~(6)~~] §1101.652(b)(13);

(15) [~~(7)~~] §1101.652(b)(15) - (21) [~~(17)~~];

[~~(8) §1101.652(b)(19) - (21);~~]

(16) [~~(9)~~] §1101.652(b)(24) - (27); [~~(25); and~~]

(17) [~~(10)~~] §1101.652(b)(32) - (33);[~~.~~]

(18) 22 TAC §§535.145 - 535.148;

(19) 22 TAC §535.156; and

(20) 22 TAC §§535.159 - 535.160.

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §§535.201, 535.206, 535.209, 535.212 - 535.218, 535.221, 535.222, 535.226

The Texas Real Estate Commission (TREC or the commission) proposes new §535.201, regarding Definitions; amendments to §535.206, regarding The Texas Real Estate Inspector Committee; new §535.209, regarding Examinations; new §535.212, regarding Education and Experience Requirements for a License; new §535.213, regarding Approval of Courses in Real Estate Inspection; new §535.214, regarding Providers of Real Estate Inspections Courses; amendments to §535.215, regarding Inactive Inspector Status; amendments to §535.216, regarding Renewal of License or Registration; new §535.217, regarding Contact Information; amendments to §535.218, regarding Continuing Education, amendments to §535.221, regarding Advertisements; amendments to §535.222, regarding Inspection Reports; and amendments to §535.226, regarding Sponsorship of Apprentice Inspectors and Real Estate Inspectors.

Proposed amendments to these sections, as well as proposed new rules reflect a non-substantive reorganization of 22 TAC Chapter 535, Subchapter R, to improve readability of the rules based on changes identified through the agency's rule review process. Other provisions throughout the rules modify language to allow the agency and its licensees to better take advantage of opportunities for online license management, as well as electronic delivery of notices and license certificates. In addition to these non-substantive amendments, a number of substantive changes are being proposed.

Proposed new §535.201, Definitions, would consolidate definitions related to regulation of inspectors, including code organization and trade association, and introduces a Texas Standards of Practice/Legal/Ethics Update course.

Proposed amendments to §535.206, The Texas Real Estate Inspector Committee, would clarify that a member only serves until a successor has been appointed if the member completes his or her term and would make other non-substantive changes to the section.

Proposed new §535.209, Examinations, would move the examination provisions from §535.214 (proposed for repeal) and would lower the minimum passing score on the professional inspector examination from 80% to 75%.

Proposed new §535.212, Education and Experience Requirements for a License, would allocate the numbers of hours of education required by Chapter 1102 for licensure as a real estate inspector or professional inspector among the core subject matter areas. This proposed change addresses both the hours required under the traditional three-tier method of licensure, as well as the hours required for the education/experience substitute method.

Proposed new §535.213, Approval of Courses in Real Estate Inspection, would increase the maximum amount of classroom course time that may be spent on field work from 10% to 50% and would further define a core course area of "legal/ethics."

Proposed new §535.214, Providers of Real Estate Inspection Courses, incorporates content from current §535.212 regarding the requirements for providers of courses in real estate inspection.

Proposed amendments to §535.215, Inactive Inspector Status, reflects a change in requirements regarding inactive and active status to better take advantage of opportunities for online license management.

Proposed amendments to §535.216, reflects the commission's move toward online filing of applications and related forms, as well as electronic delivery of notices. Section 535.216 changes the name from "Renewal of License or Registration" to "Renewal of License".

Proposed new §535.217, Contact Information, would require that licensees provide the commission with a phone number and email address in addition to the permanent mailing address that is currently required, and this proposed section would further require licensees to keep the commission apprised of any changes to this contact information.

Proposed amendments to §535.218, Continuing Education, would require all real estate inspectors and professional inspectors to take a six-hour Texas Standards of Practice/Legal/Ethics Update course in order to renew a license. This course would not increase the total number of hours required to renew but would be counted toward the 32-hour requirement to renew a 2-year license.

Proposed amendments to §535.221, Advertisements, would explicitly bring electronic social media used for the purpose of gaining business into the definition of "advertisements" and would clarify how the rules relating to inspector advertising apply to these types of advertisements and how inspectors must identify themselves and provide their license numbers on such advertisements.

Proposed amendments to §535.222, Inspection Reports, would clarify that the names of each inspector who participated in performing an inspection, as well as all supervising real estate inspectors and/or sponsoring professional inspectors, must appear on inspection reports. The proposed amendments would also eliminate the signature requirement on inspection reports and would require inspectors to deliver reports within three days unless otherwise agreed to in writing.

Proposed amendments to §535.226, Sponsorship of Apprentice Inspectors and Real Estate Inspectors, would reflect the move toward online license management and would also eliminate language requiring signatures on inspection reports.

Devon V. Bijansky, Deputy General Counsel, has determined that for the first five-year period the amendments and new rules are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments and new rules. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new rules. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the amendments and new rules.

Ms. Bijansky also has determined that, for each year of the first five years the amendments and new rules are in effect, the public benefit anticipated as a result of enforcing the amendments and new rules will be greater availability of members willing to serve on the Inspector Committee; greater availability of inspectors with a broader base of understanding of inspection principles; increased clarity regarding the requirements for inspector advertising, report identification, and delivery of reports; and improved efficiency within the agency.

Comments on the proposal may be submitted to Devon V. Bijansky, Deputy General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments and new rules are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regula-

tions necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapter 1102 to ensure compliance with the provisions of the chapter.

The statute affected by this proposal is Texas Occupations Code, Chapter 1102. No other statute, code or article is affected by the proposal.

§535.201. Definitions.

The following definitions shall apply to this subchapter.

(1) Code organization--A non-profit organization whose primary mission is to develop and advocate scientifically-based codes and standards relating to one or more of the systems found in an improvement to real estate.

(2) Texas Standards of Practice/Legal/Ethics Update--Course addressing developments related to the inspection field, including the requirements of Chapter 1102, Rules, case law, and agency enforcement actions.

(3) Trade association--A cooperative, voluntarily joined association of business or professional competitors that is designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting their common interest.

§535.206. The Texas Real Estate Inspector Committee.

(a) The functions of the committee are as prescribed by [~~Texas Occupations Code,~~] Chapter 1102.

(b) - (c) (No change.)

(d) Members of the committee serve staggered six-year terms, with the terms of two inspector members and one public member expiring on February 1 of each odd-numbered year. Initial appointments may be made for terms shorter than six years in order to establish staggered terms. A member whose term has expired holds office until the member's successor is appointed. If a vacancy occurs during a member's term, the commission shall appoint a person to fill the unexpired term.

(e) (No change.)

(f) The commission may remove a committee member if the member:

(1) - (2) (No change.)

(3) is absent from more than half of the regularly scheduled committee [~~commission~~] meetings that the member is eligible to attend during each calendar year, unless the absence is excused by majority vote of the committee; or

(4) violates [~~Texas Occupations Code,~~] Chapter 1102.

(g) - (n) (No change.)

§535.209. Examinations.

(a) There shall be an examination for a real estate inspector license and for a professional inspector license. Questions shall be used which will measure competency in the subject areas required for a license by Chapter 1102, and which will demonstrate an awareness of its provisions relating to inspectors. Each real estate inspector applicant must achieve a score of at least 70% on the examination. Each professional inspector applicant must achieve a score of at least 75% on the examination.

(b) Except as otherwise required by Chapter 1102 or this section, examinations shall be conducted as provided by §535.61 of this title (relating to Examinations).

§535.212. Education and Experience Requirements for a License.

(a) To become licensed as a real estate inspector or professional inspector, a person must satisfy:

(1) the education and experience requirements outlined in §1102.108 and §1102.109 of Chapter 1102; or

(2) the substitute education and experience requirements established by the commission pursuant to §1102.111.

(b) A person may satisfy the 90-hour education requirement for licensure as a real estate inspector pursuant to subsection (a)(1) of this section by completing the following coursework:

(1) 10 hours in foundations;

(2) 8 hours in framing;

(3) 10 hours in building enclosure;

(4) 10 hours in roof systems;

(5) 8 hours in plumbing systems;

(6) 10 hours in electrical systems;

(7) 10 hours in heating, ventilation, and air conditioning systems;

(8) 8 hours in appliances;

(9) 4 hours in Texas Standards of Practice;

(10) 4 hours in Texas Standard Report Form/Report Writing; and

(11) 8 hours in Texas Legal/Ethics.

(c) A person may satisfy the 128-hour education requirement for licensure as a professional inspector pursuant to subsection (a)(1) of this section by completing the following coursework:

(1) the courses required for licensure as a real estate inspector in subsection (b) of this section;

(2) 8 additional hours in Texas Standard Report Form/Report Writing;

(3) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(4) 24 additional hours in any core inspection subject(s).

(d) For the purpose of measuring the number of inspections required to receive a license or to sponsor apprentice inspectors or real estate inspectors, the commission considers an improvement to real property to be any unit capable of being separately rented, leased or sold. Subject to the following restrictions, an inspection of an improvement to real property that includes the structural and equipment/systems of the unit constitutes a single inspection.

(1) Half credit will be given for an inspection limited to structural components only or to equipment/systems only.

(2) No more than 80% of the inspections for which experience credit is given may be limited to structural components only or to equipment/systems components only.

(3) A report addressing two or more improvements is considered a single inspection.

(4) The commission may not give experience credit to the same applicant or professional inspector for more than three complete or six partial inspections per day. No more than three applicants may receive credit for the inspection of the same unit within a 30 day period,

and no more than three apprentice inspectors may receive credit for an inspection of the same unit on the same day.

(e) For the purpose of satisfying any requirement that an applicant hold a license for a period of time in order to be eligible for a license as a real estate inspector or professional inspector, the commission shall not give credit for periods in which a license was on inactive status. An applicant for a real estate inspector license must have been licensed on active status for a total of at least three months within the 12 month period prior to the filing of the application. An applicant for a professional inspector license must have been licensed on active status for a total of at least 12 months within the 24 month period prior to the filing of the application.

(f) Substitute requirements for a real estate inspector license. A person may satisfy the substitute education and experience requirements to become licensed as a real estate inspector as follows:

(1) A person who does not have two years of experience as an architect, engineer, or engineer-in-training must:

(A) complete a total of 120 hours of core inspection coursework, as follows:

(i) 90 hours of coursework as outlined in subsection (b) of this section;

(ii) 8 additional hours in Texas Standard Report Form/Report Writing;

(iii) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(iv) 16 additional hours in any core inspection subject(s); and

(B) satisfy the substitute experience requirement by:

(i) completing 60 hours of an approved interactive experience training module presented by a licensed professional inspector and submitting a certificate of completion;

(ii) accompanying a licensed professional inspector eligible to sponsor for 60 hours of inspections and submitting a letter from the professional inspector certifying that the applicant attended 60 hours of such training; or

(iii) having three years of personal experience in a field directly related to home inspection, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical and electrical systems found in improvements to real property and providing two affidavits from persons who have personal knowledge of the applicant's work, detailing the time and nature of the applicant's relevant experience.

(2) A person who has at least two years of experience as an active practicing licensed or registered architect, professional engineer, or engineer-in-training must:

(A) complete a total of 104 hours of core inspection coursework, as follows:

(i) 90 hours of coursework as outlined in subsection (b) of this section;

(ii) 8 additional hours in Texas Standard Report Form/Report Writing; and

(iii) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(B) submit a license history from the regulatory agency that issued the license or registration documenting the period of practice as a licensed or registered architect, professional engineer, or engineer-in-training.

(g) Substitute requirements for a professional inspector license. A person may satisfy the substitute education and experience requirements to become licensed as a professional inspector as follows:

(1) A person who does not have three years of experience as an architect, engineer, or engineer-in-training must:

(A) complete a total of 328 hours of core inspection coursework, as follows:

(i) 128 hours of coursework as outlined in subsection (c) of this section;

(ii) 30 additional hours in foundations;

(iii) 30 additional hours in framing;

(iv) 12 additional hours in building enclosure;

(v) 25 additional hours in roof systems;

(vi) 25 additional hours in plumbing systems;

(vii) 25 additional hours in electrical systems;

(viii) 25 additional hours in heating, ventilation, and air conditioning systems;

(ix) 6 additional hours in appliances;

(x) 8 additional hours in Standards of Practice/Legal/Ethics;

(xi) 8 additional hours in Standard Report Form/Report Writing; and

(xii) 6 additional hours in any core inspection subject(s); and

(B) satisfy the substitute experience requirement by:

(i) completing 120 hours of an approved interactive experience training module presented by a licensed professional inspector and submitting a certificate of completion;

(ii) accompanying a licensed professional inspector eligible to sponsor for 120 hours of inspections and submitting a letter from the professional inspector certifying that the applicant attended 120 hours of such training; or

(iii) having five years of personal experience in a field directly related to home inspection, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical and electrical systems found in improvements to real property, and providing two affidavits from persons who have personal knowledge of the applicant's work, detailing the time and nature of the applicant's relevant experience.

(2) A person who has at least three years of experience as an active practicing licensed or registered architect, professional engineer, or engineer-in-training must:

(A) complete a total of 142 hours of core inspection coursework, as follows:

(i) 128 hours of coursework as outlined in subsection (c) of this section;

(ii) 8 additional hours in Texas Standard Report Form/Report Writing; and

(iii) 6 hours in Texas Standards of Practice/Legal/Ethics Update; and

(B) submit a license history from the regulatory agency that issued the license or registration documenting the period of practice as a licensed or registered architect, professional engineer, or engineer-in-training.

(h) Not more than two persons may accompany a licensed professional inspector on any inspection used to meet the experience requirement of §1102.111(a) of Chapter 1102.

§535.213. Approval of Courses in Real Estate Inspection.

(a) To be accepted for inspector licensing, a course must meet each of the following requirements.

(1) The course was devoted to a subject listed in §1102.001(5) of Chapter 1102 or this section; provided, however, that the commission will not accept more than 30 hours of course credit for inspection-related business, legal, report writing or ethics courses.

(2) The student was present in the classroom for the hours of credit granted by the course provider or completed makeup in accordance with the requirements of the provider or by applicable commission rule.

(3) Successful completion of a final examination or other form of final evaluation was a requirement for receiving credit from the provider.

(4) The daily course presentation did not exceed ten hours.

(5) The course was offered by a provider accredited by the commission to offer inspection courses or exempt from the requirement to be accredited by the commission.

(b) A classroom course may include up to 50% of total course time for appropriate field work relevant to the course topic. Field work may not be included as part of correspondence or alternative delivery courses.

(c) Except as provided to the contrary by this section, the review and acceptance of correspondence courses or courses offered by alternative delivery systems such as computers will be conducted in the manner prescribed by §535.62 of this title (relating to Acceptable Courses of Study). Correspondence courses are acceptable only if offered by or in association with an accredited college or university.

(d) Providers wishing to obtain prior approval of a classroom course shall submit the following items to the commission:

(1) a course description, including the number of hours of credit to be awarded;

(2) a timed course outline;

(3) a copy of any textbook, course outline, syllabus or other written course material provided to students;

(4) a cross reference to the course material which demonstrates in a manner that is satisfactory to the commission where the required subject matter is covered in the course; and

(5) a copy of the written final examination which measures a student's mastery of the course.

(e) The following subjects shall be considered core real estate inspection courses:

(1) Foundations, which shall include the following topics:

(A) site analysis/location;

(B) grading;

(C) foundations;

(D) flat work;

(E) material;

(F) foundation walls;

(G) foundation drainage;

(H) foundation waterproofing and damp proofing;

(I) columns; and

(J) under floor space.

(2) Framing, which shall include the following topics:

(A) flashing;

(B) wood frame - stick/balloon;

(C) roof structure - rafters/trusses;

(D) floor structure;

(E) porches/decks/steps/landings/balconies;

(F) doors;

(G) ceilings;

(H) interior walls;

(I) stairways;

(J) guardrails/handrails/balusters;

(K) fireplace/chimney;

(L) sills/columns/beams/joist/sub-flooring;

(M) wall systems/structure - headers;

(N) rammed earth;

(O) straw bale;

(P) ICF;

(Q) panelized;

(R) masonry;

(S) wood I joist;

(T) roof sheathing;

(U) wood wall;

(V) steel wall;

(W) wood structural panel; and

(X) conventional concrete.

(3) Building Enclosure, which shall include the following topics:

(A) review of foundation and roofing relation;

(B) review of flashing;

(C) cladding;

(D) windows/glazing;

(E) weather barriers;

(F) vapor barriers;

(G) insulation;

(H) energy codes; and

(I) ingress/egress.

(4) Roof Systems, which shall include the following topics:

(A) review - rafters, roof joist, ceiling joist, collar ties, knee walls, purling, trusses, wood I joist, roof sheathing, steel framing;

(B) roof water control;

(C) skylights;

(D) flashing;

(E) ventilation/non-ventilation;

(F) attic access;

(G) re-roofing;

(H) slopes - step roof/low slope/near flat;

(I) materials - asphalt, fiberglass, wood shake, wood shingle, slate, clay tile, concrete tile, fiber cement (asbestos cement, mineral cement), metal, roll, build up, modified bitumen, synthetic rubber (EPDM), plastic (PVC); and

(J) valleys.

(5) Plumbing Systems, which shall include the following topics:

(A) water supply systems;

(B) fixtures;

(C) drains;

(D) vents;

(E) water heaters (gas and electric);

(F) gas lines; and

(G) hydro-therapy equipment.

(6) Electrical Systems, which shall include the following topics:

(A) general requirements, equipment location and clearances;

(B) electrical definitions;

(C) services;

(D) branch circuit and feeder requirements;

(E) wiring methods;

(F) power and lights distribution;

(G) devices and light fixtures; and

(H) swimming pool.

(7) HVAC Systems, which shall include the following topics:

(A) heating;

(B) ventilation;

(C) air conditioning; and

(D) evaporative coolers.

(8) Appliances, which shall include the following topics:

(A) dishwasher;

(B) food waste disposer;

(C) kitchen exhaust hood;

(D) range, cooktop, and ovens (electric and gas);

(E) microwave cooking equipment;

(F) trash compactor;

(G) bathroom exhaust fan and heater;

(H) whole house vacuum systems;

(I) garage door operator;

(J) doorbell and chimes; and

(K) dryer vents.

(9) Texas Standards of Practice, which shall include the following topics:

(A) review of general principles and specific Texas practice standards;

(B) inspection guidelines for structural systems;

(C) inspection guidelines for electrical systems;

(D) inspection guidelines for heating, ventilation, and air conditioning systems;

(E) inspection guidelines for plumbing systems;

(F) inspection guidelines for appliances; and

(G) inspection guidelines for optional systems.

(10) Legal/Ethics, which shall include the following topics:

(A) Chapter 1102;

(B) commission rules related to inspectors;

(C) agency enforcement action relating to inspectors; and

(D) related case law.

(11) Texas Standard Report Form/Report Writing, which shall include the following topics:

(A) use of the required inspection report form;

(B) allowed reproductions;

(C) allowed changes;

(D) exceptions from use of the form;

(E) review of typical comments for each heading in the report; and

(F) review of generally accepted technical writing techniques.

(12) Other approved courses as they relate to real estate inspections, which shall include one or more of the following topics:

(A) Environmental Protection Agency;

(B) Consumer Product Safety Commission; and

(C) general business practices.

(f) A course approved to satisfy a specific subject matter requirement must address each part of the subject as described by this subchapter.

(g) A course that combines more than one subject into a composite course may be approved by the commission to satisfy core course education requirements; however, composite courses will not satisfy the requirements for coursework in specific subject areas unless they are approved for a specific number of hours for each subject area.

(h) An applicant may not take the same course more than once for credit toward the education requirements for a license; however,

a course for which credit was granted toward a lower license may be counted again toward the requirements for a higher license.

(i) An applicant will not receive credit for more than one course with substantially the same course content within a two year period.

§535.214. Providers of Real Estate Inspection Courses.

(a) Except as provided by this section, the accreditation and regulation of schools and courses of study in real estate inspection and the approval of instructors will be conducted as required for real estate schools by §§535.63 - 535.67 of this title.

(b) A person applying for accreditation of a real estate inspection school shall use application forms approved by the commission. All courses must be approved by the commission prior to being offered for credit. A school accredited by the commission to offer real estate courses is not required to apply for accreditation under this section to offer real estate inspection courses, provided all courses offered by the school have been approved by the commission. The commission may submit proposed courses to the Texas Real Estate Inspector Committee for review and recommendation.

(c) An entity is not required to be accredited by the commission in order to offer inspection courses if it is:

(1) a school accredited by an inspector regulatory agency of another state;

(2) a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, or by a recognized national or international accrediting body;

(3) a unit of federal, state or local government;

(4) a nationally recognized building, electrical, plumbing, mechanical or fire code organization;

(5) a professional trade association in the inspection field or in a related technical field; or

(6) an entity whose courses are approved and regulated by an agency of this state.

(d) Providers exempt from the requirement to be accredited by the commission may submit courses to the commission for preapproval. If a course is offered without first being submitted for preapproval, the commission will evaluate the course at such time as a student submits the course to the commission for credit and may determine that the course does not qualify for credit or qualifies for fewer than the full number of hours of credit.

§535.215. Inactive Inspector Status.

(a) For the purposes of this section, an "inactive" inspector is a licensed professional inspector, real estate inspector, or apprentice inspector who is not authorized by law to engage in the business of performing real estate inspections as defined by [~~Texas Occupations Code,~~] Chapter 1102 [~~(Chapter 1102)~~], and who has been placed on inactive status by the commission for any of the following reasons:

(1) - (7) (No change.)

(b) To be placed on inactive status by request, an inspector must do the following:

(1) file a request for inactive status or submit [~~apply to the commission on a form approved by the commission for that purpose, or by~~] a letter containing the inspector's name, license number and current mailing address; and

(2) if the inspector is a licensed professional inspector, confirm in writing that the inspector has, at least 30 days prior to filing the request for inactive status, given any real estate inspectors or apprentice real estate inspectors sponsored by the inspector written notice that the inspector will no longer be their sponsor.[~~at least 30 days prior to filing the request for inactive status ; and~~]

[~~(3) return the inspector's license certificate to the commission.~~]

(c) A professional inspector who has been placed on inactive status may apply to the commission for return to active status by filing a request online or on a form approved by the commission and submitting any required fee. A professional inspector may apply on a form approved by the commission to sponsor an apprentice inspector or real estate inspector who has been on inactive status. The commission may not return an inspector to active status or issue a license certificate to the inspector unless the inspector has completed within one year prior to the filing the request for return to active status any applicable continuing education courses required for renewal of the type of license held by the inspector or satisfied the continuing education requirements in order to obtain the current license.

(d) - (f) (No change.)

§535.216. Renewal of License [~~or Registration~~].

(a) A person licensed by the commission under [~~Texas Occupations Code,~~] Chapter 1102 [~~(Chapter 1102),~~] may renew the license by timely filing the prescribed application for renewal, paying the appropriate fee to the commission and satisfying applicable continuing education requirements as required by Chapter 1102, and by §535.218 of this title (relating to Continuing Education), and providing to the commission proof of professional liability insurance, or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102, with a minimum limit of $100,000 per occurrence as required by §535.211 of this title (relating to Professional Liability Insurance) and §1102.203 of Chapter 1102 [~~, Texas Occupations Code~~].

(b) A licensee also may renew an unexpired license by accessing the commission's Internet web site, entering the required information on the renewal application form, satisfying applicable education and professional liability insurance, or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102 requirements and paying the appropriate fee in accordance with the instructions provided at the site by the commission.

(c) [~~(b)~~] The commission shall send a renewal notice to each licensee [~~mail the prescribed renewal application form to the last known permanent mailing address of the licensee as shown in the commission's computerized records~~] at least 90 days prior to the expiration of the license. [~~Each licensee shall furnish a permanent mailing address to the commission and report all subsequent address changes within 10 days after a change of address. If a licensee fails to provide a permanent mailing address, the last known mailing address for the licensee will be deemed to be the licensee's permanent mailing address.~~] An apprentice inspector or a real estate inspector must be sponsored by a licensed professional inspector in order to renew a license on an active status. It is the responsibility of the licensee to apply for renewal, and failure to receive a renewal notice [~~application form~~] does not relieve the licensee of the responsibility of applying for renewal.

[~~(c) A licensee also may renew an unexpired license by accessing the commission's Internet web site, entering the required information on the renewal application form, satisfying applicable education and professional liability insurance, or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102 requirements and paying the appropriate fee in accordance with the instructions provided at the site by the commission.~~]

(d) A licensee shall provide information requested by the commission in connection with an application to renew a license within 30 days after the commission requests the information. Failure to provide information requested by the commission in connection with a renewal application within the required time is grounds for disciplinary action under [~~Texas Occupations Code,~~] §1101.656 of the Act.

[~~(e) A renewal application is deemed filed when placed in the mail properly addressed to the commission with appropriate postage paid.~~]

(e) [~~(f)~~] An inspector licensed on active status who timely files a renewal application together with the applicable fee, evidence of completion of any required continuing education courses, and proof of professional liability insurance, or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102, may continue to practice prior to receiving a new license certificate from the commission. If the license has expired and the licensee files an application to renew the license, the licensee may not practice until the new certificate is received.

§535.217. Contact Information.

Each licensee shall furnish a permanent mailing address, phone number, and email address to the commission and shall report all subsequent changes within 10 days after a change of any of the listed contact information. If a licensee fails to update a permanent mailing address, the last known mailing address for the licensee will be deemed to be the licensee's permanent mailing address.

§535.218. Continuing Education.

(a) Continuing education for renewal of a real estate inspector or professional inspector license must include six hours of Texas Standards of Practice/Legal/Ethics Update.

(b) [~~(a)~~] Except as provided by this section, [~~core~~] real estate inspection courses submitted by professional inspectors or real estate inspectors to satisfy the requirements of [~~Texas Occupations Code~~] §1102.205 of Chapter 1102 for continuing education must qualify for core inspection credit under [~~comply with~~] §535.212 of this title (relating to Education and Experience Requirements for a License).

(c) In addition to the core real estate inspection courses defined in §1102.001(5) of Chapter 1102 and §535.212 of this title, the commission also will accept a course related to wood-destroying insects, radon, asbestos, lead, or other hazardous substances to satisfy continuing education requirements.

(d) [~~(b)~~] Courses submitted for continuing education credit must be successfully completed during the term of the current license. The commission may not grant continuing education credit twice for the same course taken by a licensee within a 2-year period.

(e) [~~(c)~~] Other than for correspondence courses or courses offered by alternative delivery methods, such as by computer, completion of a final examination is not required for a licensee to obtain continuing education credit for a course.

(f) [~~(d)~~] A professional inspector or real estate inspector who fails to renew a license that is [~~which was~~] subject to continuing education requirements and who files an application for renewal within one year after the previous license has expired must provide evidence satisfactory to the commission that the applicant has completed any continuing education that would have been required for timely renewal of the previous license. Continuing education courses submitted toward renewal of a license [~~as part of the application~~] must have been completed during the license period. [~~within a 24-month period prior to the filing of the application.~~]

[~~(e) In addition to the core real estate inspection courses defined in Texas Occupations Code, §1102.001(5) and §535.212 of this title, the commission also will accept a course related to wood-destroying insects, radon, asbestos, lead, or other hazardous substances to satisfy continuing education requirements.~~]

(g) [~~(f)~~] Licensed professional inspectors, real estate inspectors and apprentice inspectors may renew a license on inactive status. Inspectors [~~Professional inspectors and real estate inspectors~~] are not required to complete continuing education courses as a condition of renewing a license on inactive status but must satisfy continuing education requirements before returning to active status. [~~Continuing education requirements for return to active status must be satisfied as provided by §535.215 of this title (relating to Inactive Inspector Status).~~]

(h) [~~(g)~~] Providers may request continuing education credit be given to instructors of core real estate inspection courses subject to the following guidelines.

(1) The instructors may receive credit for only those portions of the course which they teach.

(2) The instructors may receive full course credit by attending all of the remainder of the course.

(i) [~~(h)~~] The commission will not grant partial credit to an inspector who attends a portion of a course. [~~will accept a course approved to satisfy the additional education hours required by §535.212(b)(1)(B) of this title to satisfy continuing education requirements, provided that the licensee attends the entire course.~~]

§535.221. Advertisements.

(a) For the purposes of this section, advertisements are all communications created or caused to be created by a licensed inspector for the purpose of inducing or attempting to induce a member of the public to use the services of the inspector, including [~~include,~~] but [~~are~~] not limited to the following types of communications when disseminated for this purpose:[~~,~~] inspection reports, business cards, invoices, signs, brochures, email [~~all electronic media including E-mail and~~], the Internet, electronic transmissions, text messages, and purchased telephone directory displays and advertising by newspaper, radio and television.

(b) - (c) (No change.)

(d) Websites containing advertising by one or more inspectors must include the license number of each licensed person whose name or assumed business name appears on the website. For the purposes of an inspector's or inspection company's own website, it is sufficient for the license number(s) to appear on a single prominent page of the website, such as the main page or the "About Us" page. For the purposes of social networking websites, including websites through which licensees may transmit electronic messages to other members of the same site, it is sufficient for license number(s) to appear on the inspector's main or profile page.

(e) [~~(d)~~] The commission may reprimand or suspend or revoke the license of a person who is found to have engaged in false or misleading advertising or to have failed to comply with provisions of this section.

§535.222. Inspection Reports.

(a) For each inspection, the inspector shall:

(1) (No change.)

(2) deliver the report [~~within a reasonable period of time~~] to the person for whom the inspection was performed within three days unless otherwise agreed in writing by the client.

(b) The inspection report shall include:

(1) the name and license number of each inspector who participated in performing the inspection, as well as the name(s) and license number(s) of any supervising real estate inspector(s) and sponsoring professional inspector(s), if applicable [~~the responsible inspector~~];

[~~(2) the name and license number of the apprentice or real estate inspector, and the signature of the inspector's sponsoring professional inspector, if applicable;~~]

(2) [~~(3)~~] the address or other unique description of the property on each page of the report; and

(3) [~~(4)~~] the client's name.

§535.226. Sponsorship of Apprentice Inspectors and Real Estate Inspectors.

(a) An apprentice inspector or real estate inspector may be sponsored by only one licensed professional inspector. [~~A real estate inspector may be sponsored by only one licensed professional inspector.~~]

(b) (No change.)

(c) An apprentice inspector or real estate inspector who is on active status may act for the new sponsoring professional inspector once the commission has been notified of the change and any required fee has been submitted [~~written notice has been placed in the mail to the commission along with the fee for reporting any change of address~~]. If the apprentice or real estate inspector is on inactive status, the return to active status shall be subject to the requirements of §535.215 of this title (relating to Inactive Inspector Status).

[~~(d) Written inspection reports must be signed by the apprentice inspector who performed the inspection and by the real estate inspector or professional inspector who directly supervised the inspection.~~]

(d) [~~(e)~~] A licensed professional inspector is responsible for the conduct of a sponsored [~~licensed~~] apprentice inspector [~~sponsored by the professional inspector~~]. At a minimum, a licensed professional inspector shall provide direct supervision of the apprentice inspector by [~~the following means~~]:

(1) accompanying the apprentice inspector during the performance of all inspections performed by the apprentice or arranging for a real estate inspector to accompany the apprentice; and

(2) reviewing any written inspection report prepared by the apprentice inspector for compliance with the provisions of the standards of practice adopted by the commission.

(e) [~~(f)~~] A licensed professional inspector is responsible for the conduct of a sponsored [~~licensed~~] real estate inspector [~~sponsored by the professional inspector~~]. A licensed professional inspector shall provide indirect supervision in a manner which protects the public when dealing with the real estate inspector [~~and any licensed apprentice inspectors directly supervised by the real estate inspector~~]. At a minimum a professional inspector shall provide indirect supervision of the real estate inspector by [~~doing the following~~]:

(1) communicating with the real estate inspector on a regular basis about the inspections being performed by the real estate inspector; and

(2) reviewing on a regular basis written inspection reports prepared by the real estate inspector for compliance with the provisions of the standards of practice adopted by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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22 TAC §§535.212 - 535.214

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Real Estate Commission (TREC or the commission) proposes the repeal of §535.212, regarding Education and Experience Requirements for an Inspector License, §535.213, regarding Schools and Courses of Study in Real Estate Inspection, and §535.214, regarding Examinations, Providers of Real Estate Inspections Courses.

The proposed repeal of these provisions reflects a non-substantive reorganization of 22 TAC Chapter 535, Subchapter R, to improve readability of the rules based on changes identified through the agency's rule review process. Other provisions throughout the rules modify language to allow the agency and its licensees to better take advantage of opportunities for online license management, as well as electronic delivery of notices and license certificates.

The current §535.212, Education and Experience Requirements for an Inspector License, is proposed for repeal and proposed new §535.212, Education and Experience Requirements for an Inspector License, would reorganize the provisions of the section and allocate the number of hours of education required by Chapter 1102 for licensure as a real estate inspector or professional inspector among the core subject matter areas.

The current §535.213, Schools and Courses of Study in Real Estate Inspection, is proposed for repeal and new §535.213, Approval of Courses in Real Estate Inspection, would reorganize the provisions of the section and increase the maximum amount of classroom course time that may be spent on field work from 10% to 50% and would further define a core course area of "legal/ethics."

The repeal of §535.214 is proposed as a part of a reorganization of the rules resulting from the agency's rule review process. The Examinations section of the rules regarding inspectors is being moved to new §535.209.

Devon V. Bijansky, Deputy General Counsel, has determined that for the first five-year period the repeals are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeals. There is no anticipated economic cost to persons who are required to comply with the proposed repeals. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the repeals.

Ms. Bijansky also has determined that, for each year of the first five years the repeals as proposed are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater readability of the rules regarding inspectors.

Comments on the proposal may be submitted to Devon V. Bijansky, Deputy General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The repeals are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapter 1102 to ensure compliance with the provisions of the chapter.

The statute affected by these proposed repeals is Texas Occupations Code, Chapter 1102. No other statute, code or article is affected by the proposal.

§535.212. Education and Experience Requirements for an Inspector License.

§535.213. Schools and Courses of Study in Real Estate Inspection.

§535.214. Examinations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005034
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 465-3926

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SUBCHAPTER S. RESIDENTIAL RENTAL LOCATORS

22 TAC §535.300

The Texas Real Estate Commission (TREC or the commission) proposes an amendment to §535.300, regarding Advertising by Residential Rental Locators.

Section 535.300 is amended to clarify that the definition of "advertisement in §535.154 applies to rental locators.

Generally speaking, the amendment corrects typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendment. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the amendment.

Ms. DeHay also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be more streamlined and readable rules.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the proposal.

§535.300. Advertising by Residential Rental Locators.

(a) This section is intended to establish standards relating to permissible forms of advertising by a person licensed as a real estate broker or salesperson and functioning as a residential rental locator ("locator"). For the purposes of this section, the term "residential rental locator" shall have the meaning provided by [~~Texas Occupations Code, Chapter 1101 (the Act),~~] §1101.002(6) of the Act. For the purposes of this section, the term "advertisement" shall have the same meaning provided by §535.154(a) of this chapter (relating to Advertising) [~~includes, but is not limited to advertising in printed form, signs, or advertising using radio, television or personal computers~~].

(b) - (d) (No change.)

(e) Advertising by locators must also comply with the provisions of [~~the Act,~~] §1101.652(b)(23) of the Act and §535.154 of this chapter [~~title (relating to Misleading Advertising)~~].

(f) Failure to comply with this section is grounds for the commission to reprimand a licensee, to suspend or revoke a license, to take other disciplinary action, and/or to impose an administrative penalty in accordance with §1101.701 of the Act[~~, §1101.757~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta R. DeHay
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3926

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CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.20, 537.28, 537.30 - 537.32, 537.37, 537.43, 537.47, 537.53

The Texas Real Estate Commission (TREC) proposes amendments to §537.20, concerning Standard Contract Form TREC No. 9-8; §537.28, concerning Standard Contract Form TREC No. 20-9, One to Four Family Residential Contract (Resale); §537.30, concerning Standard Contract Form TREC No. 23-10, New Home Contract (Incomplete Construction); §537.31, concerning Standard Contract Form TREC No. 24-10, New Home Contract (Completed Construction); §537.32, concerning Standard Contract Form TREC No. 25-7, Farm and Ranch Contract;

§537.37, concerning Standard Contract Form TREC No. 30-8, Residential Condominium Contract; §537.43, concerning Standard Contract Form TREC No. 36-6, Addendum for Property Subject to Mandatory Membership in a Property Owners Association; §537.47, concerning Standard Contract Form TREC No. 40-4 Third Party Financing Condition Addendum; and new §537.53, concerning Standard Contract Form TREC No. 46-0, Non-Realty Items Addenda. The amendments and new rule propose to adopt by reference eight revised contract forms and one new form for use by Texas real estate licensees.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendment to §537.20 proposes to adopt by reference Standard Contract Form TREC No. 9-8, Unimproved Property Contract. The proposed revisions are the same as those proposed for Form TREC No. 20-9, except for paragraph 2.

The amendments to §537.28 propose to adopt by reference Standard Contract Form TREC No. 20-9, One to Four Family Residential Contract (Resale). Paragraph 2.B. is revised to include mounts and brackets for televisions and speakers; the phrase regarding controls in paragraph 2.C. is rewritten and placed at the end of the list of accessories. Paragraph 4.A.(1) is amended to provide examples of underwriting examples to include appraisal, insurability, and lender required repairs; the termination provision under this paragraph is revised. Paragraph 4.A.(2) is revised to change Financing Approval to Credit approval. The sentence regarding Sellers failure to timely provide the existing survey or affidavit in paragraph 6.C.(1) is moved from the end of the paragraph to the middle of the paragraph; a new subparagraph (4) is added with a checkbox indicating no survey is required; paragraph 6.E.(2) is revised to delete apostrophes to be consistent with statutory provisions. Paragraph 7.D.(2) is rewritten to include a blank line for specific repairs and an admonishment telling parties not to insert general phrases. A notice is added to the end of paragraph 7 reminding the parties about the buyer's rights to conduct inspections, negotiate repairs under a subsequent amendment, or terminate during the option period, if any. Paragraph 9.B.(3) is rewritten; new subparagraph 5 regarding leases is added to paragraph 9.B. The two sentences at the end of paragraph 10 are underlined. Paragraph 12.A.(2) is restructured Paragraph 18.B. is rewritten for clarity. Addenda are added to and deleted from paragraph 22. Option Period is defined in paragraph 23. Paragraph 24 is rewritten. The Broker Information page is rewritten and restructured.

The amendment to §537.30 proposes to adopt by reference Standard Contract Form TREC No. 23-10, New Home Contract (Incomplete Construction). The proposed revisions are the same as those proposed for Form TREC No. 20-9, except for paragraph 2, paragraph 6.C.(1), paragraph 7.B., paragraph and 9.B.(5).

The amendment to §537.31 proposes to adopt by reference Standard Contract Form TREC No. 24-10, New Home Contract (Completed Construction). The proposed revisions are the same as those proposed for Form TREC No. 20-9, except for paragraph 2, paragraph 6.C.(1), paragraph 7.B., paragraph and 9.B.(5).

The amendment to §537.32 proposes to adopt by reference Standard Contract Form TREC No. 25-7, Farm and Ranch Contract. Except for paragraph 6.C.(4) which is already in the contract, and the ratification page in which no changes are made, the same amendments are made as those proposed for Form TREC No. 20-9. In addition, paragraph 2.F. is revised to delete "mineral" and "royalty."

The amendment to §537.37 proposes to adopt by reference Standard Contract Form TREC No. 30-8, Residential Condominium Contract. The same amendments are made to 30-8, Residential Condominium Contract as those proposed for Form TREC No. 20-9. In addition, paragraphs 2.B.(2) and 2.C.(2) are amended by adding a provision regarding Buyer's cancellation of the contract; subparagraph (3) is revised and subparagraph (4) is added to paragraph 12.

The amendment to §537.43 propose to adopt by Standard Contract Form TREC No. 36-6, Addendum for Property Subject to Mandatory Membership in a Property Owners Association. Subparagraph A.2. is revised to add a reference to providing an updated resale certificate. New paragraph C. is added regarding deposits and reserves.

The amendment §537.47 proposes to adopt by reference Standard Contract Form TREC No. 40-4 Third Party Financing Condition Addendum. The references to "Financing Approval" are changed to "Credit Approval." The reference to "Loan Fees" is changed to "Adjusted Original Charges" in subparagraphs (1) and (2) of paragraph A, and paragraphs C and D. The note regarding HUD 92564-CN is deleted.

New §537.53 proposes to adopt by reference Standard Contract Form TREC No. 46-0, Non-Realty Items Addendum. The new addendum is to be used when personal property is sold in conjunction with the real estate transaction.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the amendments and new section are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the amendments and new section. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the amendments and new section. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new section, other than the costs of obtaining copies of the forms, which would be available at no charge through the TREC web site.

Ms. DeHay also has determined that for each year of the first five years the amendments and new section are in effect the public benefit anticipated as a result of enforcing the amendments and new section will be the availability of current standard contract forms.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments and new section are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposal.

§537.20. Standard Contract Form TREC No. 9-8 [7].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 9-8 [7] approved by the Texas Real Estate Commission in 2010 [2008] for use in the sale of unimproved property where intended use is for one to four family residences. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.28. Standard Contract Form TREC No. 20-9 [8].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 20-9 [8] approved by the Texas Real Estate Commission in 2010 [2008] for use in the resale of residential real estate. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.30. Standard Contract Form TREC No. 23-10 [9].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 23-10 [9] approved by the Texas Real Estate Commission in 2010 [2009] for use in the sale of a new home where construction is incomplete. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.31. Standard Contract Form TREC No. 24-10 [9].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 24-10 [9] approved by the Texas Real Estate Commission in 2010 [2009] for use in the sale of a new home where construction is completed. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.32. Standard Contract Form TREC No. 25-7 [6].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 25-7 [6] approved by the Texas Real Estate Commission in 2010 [2008] for use in the sale of a farm or ranch. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.37. Standard Contract Form TREC No. 30-8 [7].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 30-8 [7] approved by the Texas Real Estate Commission in 2010 [2008] for use in the resale of a residential condominium unit. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.43. Standard Contract Form TREC No. 36-6 [5].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 36-6 [5] approved by the Texas Real Estate Commission in 2010 [2008] for use as an addendum to be added to promulgated forms in the sale of property subject to mandatory membership in an owners [a property owners'] association. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.47. Standard Contract Form TREC No. 40-4 [3].

The Texas Real Estate Commission adopts by reference standard contract form, TREC No. 40-4 [3] approved by the Texas Real Estate Commission in 2010 [2008] for use as an addendum to be added to promulgated forms of contracts when there is a condition for third party financing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.53. Standard Contract Form TREC No. 46-0.

The Texas Real Estate Commission adopts by reference standard contract form, TREC No. 46-0 approved by the Texas Real Estate Commission in 2010 for use as an addendum to be added to promulgated forms of contracts when personal property is sold in conjunction with a real estate transaction. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta R. DeHay
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Texas Real Estate Commission
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES
SUBCHAPTER KK. HEALTH CARE REIMBURSEMENT RATE INFORMATION

28 TAC §§21.4501 - 21.4507

The Texas Department of Insurance (Department) proposes new Subchapter KK, §§21.4501 - 21.4507, concerning the collection and submission of aggregate health care reimbursement rate information by health benefit plan issuers. The Department proposes this new subchapter to implement SECTION 8 of Senate Bill (SB) 1731, enacted by the 80th Legislature, Regular Session, effective September 1, 2007. Senate Bill 1731 adds new Insurance Code Chapter 38, Subchapter H, which requires the Department to collect data concerning health benefit plan reimbursement rates by region. This bill requires the Department to create a new data collection program to collect certain information related to the reimbursement rates and to organize this information in a specific fashion. The proposed new subchapter applies to issuers of preferred provider benefit plans, health maintenance organization plans, and specified governmental employee plans under the Insurance Code Chapters 1551, 1575, 1579, and 1601. The Insurance Code §38.351 states that the purpose of the subchapter is to authorize the Department to collect data concerning health benefit plan reimbursement rates in a uniform format, and disseminate, on an aggregate basis for geographical regions in this state, information concerning health care reimbursement rates derived from the data. Section 38.354 gives the Commissioner the authority to adopt rules to implement the

subchapter. Section 38.355 requires the Department to develop data submission requirements in a manner that allows collection of reimbursement rates as a dollar amount and not by comparison to other standard reimbursement rates. Section 38.353(e) authorizes the exclusion by rule of a type of health benefit plan from the requirements of the Insurance Code Chapter 38, Subchapter H, if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. Section 38.353(e) is implemented in proposed §§21.4501 - 21.4507 by exempting health benefit plan issuers if the total number of covered lives in private market preferred provider benefit plans or health maintenance organizations offered by the issuer in Texas does not exceed 10,000 persons as of December 31 of the year preceding the report. The proposed rules prescribe the data submission requirements and form for submission of data related to health care reimbursement rates by health benefit plan issuers, specify definitions to implement the Insurance Code Chapter 38, Subchapter H, and facilitate the Department's provision of aggregate health care reimbursement rate information derived from the data collected under this subchapter to the Department of State Health Services (DSHS) for publication. Proposed new §§21.4501 - 21.4507 are necessary to implement the data collection requirements in the Insurance Code Chapter 38, Subchapter H, and SECTION 19 of SB 1731. Pursuant to the Insurance Code §38.355, health benefit plan issuers are required to submit data for the period specified by the Department at the time and in the form and manner required by the Department. Section 38.355 further mandates that the data be submitted in a standardized format to permit comparison of health care reimbursement rates and that the submission requirements allow, to the extent feasible, for the collection of reimbursement rates as a dollar amount and not by comparison to other standard reimbursement rates, such as Medicare reimbursement rates. Definitions are specified for purposes of standardization. Further, the Insurance Code §38.357 requires the Department to provide aggregate health care reimbursement rate information derived from the data collected under the subchapter to DSHS for publication. The proposed new subchapter will facilitate the provision of this information.

The Department held a preliminary stakeholder meeting February 28, 2009, to discuss concepts for implementation of Subchapter H. The Department posted an informal draft of this proposal on its website August 4, 2009, and invited further public comment. Originally set to expire August 12, the informal comment period was extended until August 17, 2009, at the request of stakeholders. The informal draft was additionally discussed at a second stakeholder meeting September 24, 2009. Using stakeholder feedback, the Department has identified approximately 280 Current Procedural Terminology (CPT) codes, and 60 Medicare severity diagnosis related group (MS-DRG) codes for which data is proposed for collection in Form No. LHL616, entitled Health Care Claims Reimbursement Rate Report. The Department proposes Form No. LHL616 (Health Care Claims Reimbursement Rate Report) for adoption by reference in §21.4507. The codes represent commonly used or particularly expensive procedures for some categories of professional services, as well as outpatient and inpatient services by institutional providers. In selecting procedures for purposes of the proposed data collection, the Department considered information and recommendations provided by members and representatives of the physician and institutional provider community and health insurers. The Department also considered: (i) reimbursement claims reports by the Centers for Medicare and Medicaid Services (CMS) under the Health Care Economics Program; (ii) inpatient and outpatient reports from the CMS National Claims History database; (iii) claims data reports from the Texas Department of State Health Services Inpatient Hospital Discharge Database; and (iv) claims experience data reports provided by the Texas Health Insurance Risk Pool.

The following provides an overview of and explains additional reasoned justification for the proposed new rules.

Proposed §21.4501 states the purpose of the proposed new subchapter, which includes the collection of data concerning health benefit plan reimbursement rates in a uniform format.

Proposed §21.4502 identifies the types of health benefit plans to which the new subchapter does and does not apply. Proposed §21.4502 addresses and reiterates the Insurance Code §38.353.

Proposed §21.4503 provides definitions for terms used in the proposed new rules, including *group health benefit plan, institutional provider, physician, provider, and reporting period. Group health benefit plan* is defined in proposed §21.4503(1) as specified in the Insurance Code §38.352 to mean a *preferred provider benefit plan* as defined by the Insurance Code §1301.001, or an *evidence of coverage* for a health care plan that provides basic health care services as defined by the Insurance Code §843.002. The Insurance Code §1301.001(9) defines *preferred provider benefit plan* as a benefit plan in which an insurer provides, through its *health insurance policy,* for the payment of a level of coverage that is different from the basic level of coverage provided by the health insurance policy if the insured person uses a preferred provider. Section 1301.001(2) defines *health insurance policy* as a group or individual insurance policy, certificate, or contract providing benefits for medical or surgical expenses incurred as a result of an accident or sickness. The Insurance Code §843.002, in turn, defines *evidence of coverage* to mean any certificate, agreement, or contract, including a blended contract, that: (i) is issued to an enrollee; and (ii) states the coverage to which the enrollee is entitled. The term *group health benefit plan,* therefore, includes both group and individual coverage. The Department has further clarified in proposed §21.4503(1) that the term does not include a health maintenance organization plan providing routine dental or vision services as a single health care service plan or a preferred provider benefit plan providing routine vision services as a single health care service plan. As previously discussed, the Insurance Code §38.353(e) authorizes the exclusion by rule of a type of health benefit plan from the requirements of the Insurance Code Chapter 38, Subchapter H, if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. The routine dental or vision services provided under single health care service plans are not consistent with the general reimbursement data that will be collected under proposed new Subchapter KK at this time. *Institutional provider* is defined in proposed §21.4503(2) as an institution providing health care services, including but not limited to hospitals, other licensed inpatient centers, ambulatory surgical centers, skilled nursing centers and residential treatment centers. *Physician* is defined in proposed §21.4503(3) as any individual licensed to practice medicine in this state and, with regard to a health maintenance organization, as defined in the Insurance Code §843.002(22). *Provider* is defined in proposed §21.4503(4) as any practitioner, institutional provider, or other person or organization that furnishes health care services and that is licensed or otherwise authorized to

practice in this state, other than a physician. *Reporting period* is defined in proposed §21.4503(5) as the six-month interval of time for which a plan or health benefit plan issuer must submit data, beginning each January 1 and ending the following June 30.

Proposed §21.4504 designates geographic regions by ZIP Code for purposes of data collection. This designation is in accordance with the Insurance Code §38.351 and §38.355, which authorize the Department to collect and disseminate aggregated data for geographical regions in this state. The geographic regions in proposed §21.4504 generally approximate the 11 Health Service Regions established by the Department of State Health Services for purposes not related to enactment of SB 1731 and are already familiar to most issuers. These regions include: (1) Region 1 - Panhandle, including Amarillo and Lubbock; (2) Region 2 - Northwest Texas, including Wichita Falls and Abilene; (3) Region 3 - Metroplex, including Fort Worth and Dallas; (4) Region 4 - Northeast Texas, including Tyler; (5) Region 5 - Southeast Texas, including Beaumont; (6) Region 6 - Gulf Coast, including Houston and Huntsville; (7) Region 7 - Central Texas, including Austin and Waco; (8) Region 8 - South Central Texas, including San Antonio; (9) Region 9 - West Texas, including Midland, Odessa, and San Angelo; (10) Region 10 - Far West Texas, including El Paso; and (11) Region 11 - Rio Grande Valley, including Brownsville, Corpus Christi, and Laredo.

Proposed §21.4505 addresses the requirements in §38.355 of the Insurance Code to collect the requested data and to specify the time periods for which the submission is to be provided. Proposed §21.4505(a) requires health benefit plan issuers and plans to collect the underlying data necessary for submission of all information specified in Form No. LHL616, proposed for adoption by reference in §21.4507. Proposed §21.4505(b) addresses the time periods for which the information and data is to be provided. It provides that: (i) the six-month reporting period for the information and data requested in Form No. LHL616 is January 1 to June 30 of the applicable calendar year; and (ii) the enrollment data required in Form No. LHL616 is for the total number of lives covered under the plans for both December 31 of the year prior to the applicable reporting period and June 30 of the applicable reporting year. Proposed §21.4505(c) allows a health benefit plan issuer that is exempt pursuant to proposed §21.4506(e) to collect and report information required in Form No. LHL616, Section B to support an exemption rather than the full data indicated in Form No. LHL616.

Proposed §21.4506 addresses the requirements and deadlines for the submission of the requested data. Proposed §21.4506(a) proposes the deadlines for the submission of the required data in annual reporting subsequent to the initial filing. Proposed §21.4506(b) specifies that the initial reporting date for the submission of the required data is 60 days from the effective date of the proposed rule. Proposed §21.4506(c) specifies the procedures for electronic filing of the required information and data. Proposed §21.4506(d) identifies the procedure for accessing the report form, including acceptance of the End User Agreement concerning use of CPT codes. Proposed §21.4506(e) requires a health benefit plan issuer asserting an exemption to the reporting requirement specified in proposed §21.4506(a) to submit an exemption statement and the data specified in Form No. LHL616 to support an exemption. Assertion of an exemption for either private market preferred provider benefit plans or health maintenance organization plans requires certification by the health benefit plan issuer that the number of covered lives in Texas in the type of plan for which an exemption is sought does not exceed 10,000 persons as of December 31 of the year preceding the report. As previously discussed, the Insurance Code §38.353(e) permits the exclusion by rule of a type of health benefit plan from the requirements of Chapter 38, Subchapter H, if the Commissioner finds that the data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. The Department anticipates that the inclusion of reimbursement data from health benefit plan issuers with enrollment that does not exceed 10,000 persons will not markedly affect the aggregate data that the Department is required to furnish to DSHS for publication as provided in the Insurance Code §38.357. For this reason, the Department proposes to permit the exemption of such plans as specified in proposed §21.4506(e). A representation of the End User Agreement included with Form No. LHL616 is provided in proposed Figure: 28 TAC §21.4506(f). The End User Agreement facilitates the Department's use of procedural codes and descriptions to which the American Medical Association asserts copyright rights.

Section 21.4507 proposes the adoption by reference of the form to be used in reporting the data required in the new subchapter (Form No. LHL616, entitled Health Care Claims Reimbursement Rate Report). Plans and health benefit plan issuers must utilize this form to submit summary company identification and contact information and to provide data on reimbursement rates for certain CPT and MS-DRG codes for each of the 11 geographic regions specified in proposed §21.4504. Qualifying health benefit plan issuers must also use this form to certify that the health benefit plan issuer is exempt from certain of the reporting requirements. Proposed §21.4507 also provides a link for accessing the form on the Department's Internet website.

Form No. LHL616, proposed to be adopted by reference in §21.4507, is comprised of Sections A - J. Section A of the form includes detailed instructions and definitions necessary for completion of each section of the form. Section B of the form includes space to report company information, contact information for an individual representative of the health benefit plan, and data certification. The remaining sections of the form include spaces for the reporting of reimbursement rate data for: (i) professional services - general, in Section C; (ii) professional services - pathology, in Section D; (iii) professional services - anesthesiology, in Section E; (iv) professional services - radiology, in Section F; (v) professional services - neonatology critical care/newborn care, in Section G; (vi) professional services - outpatient health care claims, in Section H; (vii) institutional provider - outpatient health care claims, in Section I; and (viii) institutional provider - inpatient health care claims, in Section J. For each of these respective categories of claim, the form instructs health benefit plan issuers and plans to provide aggregate reimbursement data for designated procedural and diagnostic codes for both in-network and out-of-network claims.

FISCAL NOTE. Dianne Longley, Director of Research and Analysis, Life, Health and Licensing Program, has determined that for each year of the first five years the proposed new sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of enforcing or administering the proposal.

PUBLIC BENEFIT/COST NOTE.

Anticipated Public Benefit.

Ms. Longley has determined that for each year of the first five years the proposed new sections are in effect, there are public benefits anticipated as a result of the enforcement and administration of the rule, and there will also be potential costs for persons required to comply with the proposal. The Department, however, drafted the proposed rules to maximize public benefits consistent with the intent of Chapter 38, Subchapter H of the Insurance Code while mitigating costs. The anticipated public benefits will be: (i) implementation of a new program to collect data in a uniform format concerning group health benefit plan reimbursement rates for certain in-network and out-of-network health services, including general professional services, pathology services, anesthesiology services, radiology services, neonatology services, outpatient professional and institutional provider services, and inpatient institutional provider services; (ii) dissemination on an aggregate basis for designated geographical regions in Texas the health care reimbursement rate information derived from the new data collection program; and (iii) improved transparency concerning health care reimbursement rate information that will be available to consumers. Specifically, the Insurance Code §38.357 requires the Department to provide, for identified geographical regions, aggregate health care reimbursement rate information derived from the data collected under the Insurance Code Chapter 38, Subchapter H, to the DSHS for publication. This proposal will facilitate the Department's provision of such information to the DSHS. The publication of the reimbursement rate information by the DSHS will be available to consumers. Similarly, §38.357 permits the Department to make the aggregate health care reimbursement rate information available through the Department's Internet website. If the Department also publishes the reimbursement rate information on its website, this will be another source for consumers to access the information. Although the Insurance Code §38.357 provides that the published information may not reveal the name of any health care provider or health benefit plan issuer, the Department nevertheless anticipates that the publication of the information for identified geographical regions will permit consumer comparison of health care reimbursement rate information between such regions.

Potential Costs for Persons Required to Comply with the Proposal

Overview of proposed requirements resulting in potential costs. The cost to persons required to comply with the proposed new rules results from requirements concerning: (i) the collection and preparation of health care reimbursement data as specified in proposed §21.4505; and (ii) the submission of the report as specified in proposed §21.4505 and §21.4506. The cost components associated with these compliance requirements include: (i) the cost of any additional technology or software necessary to comply with the data collection, preparation, and submission requirements in proposed §21.4505 and §21.4506, including the enrollment information and claims data specified in Form No. LHL616; (ii) personnel costs associated with programming information systems for compliance with the requirements in proposed §21.4505 and §21.4506; and (iii) personnel costs associated with completing and reviewing Form No. LHL616 in compliance with the requirements in proposed §21.4505 and §21.4506.

Persons required to comply with the proposal. In accordance with the Insurance Code §38.353(a), the persons required to comply with the proposal are issuers of a group health benefit plan, including: (i) an insurance company; (ii) a group hospital service corporation; (iii) a fraternal benefit society; (iv) a stipulated premium company; (v) a reciprocal or interinsurance exchange; and (vi) a health maintenance organization. Additionally, in accordance with the Insurance Code §38.353(b), several governmental employee plans must comply with the data submission requirements. These plans are: (i) a basic coverage plan under the Insurance Code Chapter 1551; (ii) a basic plan under the Insurance Code Chapter 1575; (iii) a primary care coverage plan under the Insurance Code Chapter 1579; and (iv) basic coverage under the Insurance Code Chapter 1601. Further, pursuant to the Insurance Code §38.353(c), small employer health benefit plans under the Insurance Code Chapter 1501 are required to comply with the data submission requirements except as provided in subsection (d) of §38.353. Under the Insurance Code §38.353(d), the data submission requirements do not apply to: (i) standard health benefit plans provided under the Insurance Code Chapter 1507; (ii) children's health benefit plans provided under the Insurance Code Chapter 1502; (iii) health care benefits provided under a workers' compensation insurance policy; (iv) Medicaid managed care programs operated under the Government Code Chapter 533; (v) Medicaid programs operated under the Human Resources Code Chapter 32; or (vi) the state child health plan operated under the Health and Safety Code Chapter 62 or 63.

Additionally, some health benefit plan issuers may report information and data on behalf of certain government employee plans. As provided in proposed Form No. LHL616, each designated governmental employee plan shall either independently submit the report required pursuant to this proposal or shall authorize and require the entity administering the governmental employee plan to submit the information and data on its behalf. A governmental employee plan may determine that the entity with which it contracts is more appropriately situated to provide the requested information. Based upon reporting on behalf of governmental employee plans in other data collections unrelated to this proposal, the Department anticipates that such delegation is more probable than not. The proposal therefore affords some flexibility to health benefit plan issuers that administer governmental employee plans. The estimated cost for reporting for a governmental employee plan should be comparable to the cost incurred by a health benefit plan issuer. To the extent that a health benefit plan issuer submits information on behalf of a governmental employee plan in addition to the issuer's own data, the cost to a governmental employee plan may be reduced. Health benefit plan issuers submitting the requested information and data on behalf of other entities in addition to submitting the information and data for themselves may incur some additional costs. Such costs may be mitigated, however, to the extent that the issuer maintains aggregate claims data for the governmental employee plans and data for the issuer's own group health benefit plans.

Potential costs resulting from certain proposed requirements. The Insurance Code §38.355(a) provides that each health benefit plan issuer shall submit to the Department, at the time and in the form and manner required by the Department, aggregate reimbursement rates by region paid by the health benefit plan issuer for health care services identified by the Department. To implement this requirement, proposed §21.4505 requires each group health benefit plan issuer and plan identified in proposed §21.4502(a) and (b) to collect the data specified in Form No. LHL616. Proposed §21.4505 further requires that the report data be prepared and filed in accordance with the requirements of proposed §21.4506. Proposed §21.4506(a) requires each plan and health benefit plan issuer to submit the completed Form No. LHL616 not later than September 1 of each year. Consistent with

SB 1731, SECTION 19, proposed §21.4505(b) further provides that the initial submission of data shall be 60 days from the effective date of the rule. Proposed §21.4506(c) requires the filed data to be submitted electronically in Excel format by: (i) accessing a link on the Department's website to obtain the report form; (ii) completing the report in accordance with the form's instructions; and (iii) emailing the completed report to the Department's email address. Proposed §21.4506(d) requires the user to indicate acceptance of the End User Agreement concerning the use of Current Procedural Terminology in order to access the report form. The content of this End User Agreement is provided at proposed §21.4506(f). Proposed §21.4506(e) permits preferred provider group health benefit plan issuers to submit to the Department an exemption statement and the required supporting data in Part B of Form No. LHL616 if the issuer meets the criteria in proposed paragraphs (1) or (2) of §21.4506(e), as applicable. Under these paragraphs, a health benefit plan issuer qualifies for an exemption if the total number of covered lives in private market plans offered by the health benefit plan issuer in Texas does not exceed 10,000 persons as of December 31 of the year preceding the report. The exemption applies to plans operating under the Insurance Code Chapter 843 or 1301, as applicable. The Department proposes to adopt Form No. LHL616 by reference in proposed §21.4507.

Cost components. The probable cost to health benefit plan issuers required to comply with this proposal will result from the following cost components: (i) the cost of any additional technology or software necessary to comply with the data collection, preparation, and submission requirements in proposed §21.4505 and §21.4506, including the enrollment information and the claims data information specified in Form No. LHL616; (ii) personnel costs associated with programming information systems for compliance with the requirements in proposed §21.4505 and §21.4506; and (iii) personnel costs associated with completing and reviewing Form No. LHL616 in compliance with the requirements in proposed §21.4505 and §21.4506.

(i) Cost of technology or software. The Department anticipates that some group health benefit plan issuers may initially incur costs related to the purchase of technology or software necessary to enable the issuer to collect, prepare, and submit health care reimbursement data in compliance with proposed §21.4505 and §21.4506. The need for such technology and software largely will be determined by the specific information technology platforms currently used by the issuer. The Department, therefore, anticipates that such need will vary among group health benefit plan issuers and that potential associated costs will vary accordingly. In addition to basic data collection requirements, proposed §21.4506(c) requires that data filed with the Department pursuant to that section be filed in Excel format. Feedback from representatives of various issuers at stakeholder meetings indicates that Excel software is commonly used in the industry and will not likely require additional expenditure by group health benefit plan issuers. Should the purchase of the software be necessary, the program may be purchased for approximately $229.99 retail based on information the Department obtained online from various sellers.

Proposed §21.4506(c)(1) requires group health benefit plan issuers to access a link on the Department's website to obtain Form No. LHL616. The Department anticipates that access to Internet services is standard in the group health benefit plan issuer industry and therefore unlikely to cause additional costs to those issuers. Actual cost to purchase such access, should it be required, will likely vary depending upon the service provider used by the group health benefit plan issuer. Any issuers needing to purchase Internet services may contact one or more providers in their area to obtain costs. Based on information the Department obtained online from various Internet service provider websites, such services range from $99 to $600 per month for commercial accounts.

Proposed §21.4506(c)(3) requires group health benefit plan issuers to email the completed report to the Department at the Department's designated email address. The Department anticipates that access to email service is standard in the group health benefit plan issuer industry and is therefore not likely to impose additional costs to those issuers. As with access to Internet services, the cost of email services, should an additional email account be required, will likely vary depending upon the service provider used by the group health benefit plan issuer. Based on information the Department obtained online from various email providers, such services range from free or inclusive with Internet service to $4.50 per user per month for commercial accounts.

Additionally, proposed §21.4506(c)(2) requires group health benefit plan issuers to complete Form No. LHL616 in accordance with the form's instructions. Section B, Part II of the form defines the term "MS-DRG" as the most current Medicare-severity diagnosis related group code as maintained and released by the CMS Due to variations in reporting by institutional providers and lag times between claim submissions and processing, the Department anticipates that group health benefit plan issuers will require grouper software in order to provide accurate and uniform reporting of health care reimbursement data in Section J of Form No. LHL616. According to description for CMS MS-DRG software hosted by the National Technical Information Service, grouper software classifies hospital case types into groups based on diagnoses, procedures, other demographic information, and the presence of complications or co-morbidities. These groups are expected to have similar hospital resource use. The Department further anticipates that such purchase will be a recurring expense as and when the MS-DRG Codes are updated by CMS. Use of the most current grouper software is standard practice for many group health benefit plan issuers and will therefore not impose additional costs for those issuers. The actual cost of the grouper software will depend upon the vendor used by the group health benefit plan issuer. Retail grouper software can be purchased from several vendors, with prices beginning at $500. Although the Department anticipates that the cost of technology and software as necessary to comply with proposed §21.4505 and §21.4506 will vary, as described herein, for group health benefit plan issuers, each group health benefit plan issuer may use the Department's cost analysis to calculate its total costs for compliance with proposed §21.4505 and §21.4506 based on its estimated costs for the various individual cost components.

(ii) Cost of personnel associated with programming information systems. The Department anticipates that group health benefit plan issuers will undertake information system programming in order to collect information as required by proposed §21.4505(a) and as specified in Form No. LHL616. Proposed §21.4505(a) requires that issuers submit group health benefit plan issuer identification and enrollment information and data for in-network and out-of-network claim information for each of 11 geographic regions for several categories of medical and health care services. These services include: (i) general professional services; (ii) professional pathology services; (iii) professional anesthesiology services; (iv) professional radiology services;

(v) professional neonatology critical care/newborn care; (vi) outpatient professional services; (vii) outpatient institutional provider services; and (viii) inpatient institutional provider services. For each category of service, group health benefit plan issuers are required to provide health care reimbursement rate information for designated Common Procedural Terminology (CPT) or Medicare severity diagnosis related group (MS-DRG) codes, as applicable. In addition to programming as necessary to collect the required data and information, the Department anticipates that health benefit plan issuers will perform programming necessary to automate population of the Health Care Claims Reimbursement Rate Report with the collected data to the extent possible. Total programming costs will vary depending upon the number of hours required, the skill level of the programmer or programmers, the complexity of the group health benefit plan issuer's information systems, and whether outside contract programmers will be involved. Each issuer has the information needed to estimate its individual costs for such programming. However, based on the latest Texas Workforce Commission (TWC) wage information data, the mean hourly wage for a computer programmer working for an insurer in Texas is $37.54. Based upon information that the Department has previously obtained from insurers, hourly wage rates for outside contract programmers are estimated to range to as much as $200 and over per hour. The actual number, types, and cost of personnel will be determined by the group health benefit plan issuer's existing information systems and staffing. Further, issuers with larger networks operating across multiple or in all of the 11 geographical areas may incur greater costs in Form No. LHL616 than those issuers operating in fewer areas.

(iii) Cost of personnel associated with completion and review of report. The Department further estimates that to the extent that such population is not automated, group health benefit plan issuers will incur personnel costs associated with the completion of Form No. LHL616, proposed for adoption by reference at §21.4507 and required pursuant to proposed §21.4506, as well as costs associated with review of the final report. The actual number, types, and cost of personnel will be determined by the group health benefit plan issuer's existing staffing and the extent to which form completion is automated. The Department anticipates that these personnel costs will typically range from approximately $200 to $400. This estimate is based upon a member of a health benefit plan issuer's administrative staff preparing the necessary application in four to eight hours. The salary for this employee is estimated at the mean salary rate of $24.06 per hour, as set forth for similar office and administrative support positions in the latest State Occupational Employment and Wage Estimates for Texas published by the Department of Labor (DOL, May 2009) at http://www.bls.gov/oes/current/oes_tx.htm. Additionally, the Department estimates that a member of the health benefit plan issuer's management staff can review and approve the prepared information in two to four hours to complete the data certification portion of Form No. LHL616. The salary for this employee is estimated at the mean salary rate of $53.32 per hour, as set forth for similar management positions in the latest State Occupational Employment and Wage Estimates for Texas published by the DOL (May 2009).

The Department requested cost information by public comment during the posting of the informal draft of this proposal. The Department received a total cost estimate of $4,400 from one large, statewide health benefit plan issuer. The Department has made repeated requests for additional information relating to any cost components or any other basis for this estimate, but has been unable to obtain the additional information.

Exempt issuers and optional additional data inclusion. Pursuant to the Insurance Code §38.353(e), the Commissioner by rule may exclude a type of health benefit plan from the requirements of Chapter 38, Subchapter H, if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of Subchapter H. Additionally, the Insurance Code §38.353(d)(1) specifies that standard health benefit plans provided under the Insurance Code Chapter 1507 are not subject to the data submission requirements of Chapter 38. Two types of health benefit plan issuers are exempt in whole or in part from compliance with this proposal, and a third type of issuer can opt to exclude data relating to Chapter 1507 plans. The Department considered these proposed exemptions and optional data exclusion as a means of mitigating compliance costs.

First, pursuant to the Insurance Code §38.353(e), the Department has included a limited exemption in proposed §21.4505(c) and §21.4506(e) for private market preferred provider benefit plans operating under the Insurance Code Chapter 1301 and private market health maintenance organizations operating under the Insurance Code Chapter 843 that do not exceed 10,000 covered lives as of December 31 for the year preceding the submission of the report. A private market plan with exactly 10,000 covered lives as of December 31 for the year preceding the submission of the report would be eligible for the exemption. Health benefit plan issuers asserting this exemption are permitted to collect enrollment data and submit to the Department an exemption statement and the data required in Form No. LHL616 to support the exemption rather than the full data required in Form No. LHL616. As a result, such issuers may have reduced costs of compliance in comparison to those issuers that do not qualify for the exemption. Specifically, such issuers are unlikely to incur costs associated with additional technology or software necessary for compliance with data collection and preparation, and the Department anticipates that the cost of personnel associated with programming information systems will be minimal because data collection, preparation, and submission will primarily consist of enrollment information. Such issuers, however, will still incur costs of personnel associated with completion and review of the final report. However, because the information submission necessary to support an exemption consists of company identification information and enrollment data, such review will require much fewer staff hours than will a submission on behalf of an issuer not qualifying for the limited exemption. The Department anticipates that the total probable cost of preparing and submitting the information for the limited exemption under proposed new §21.4505(c) and §21.4506(e) will vary but will typically be less than $100. This estimate is based upon a member of a health benefit plan issuer's staff preparing the necessary information in one to four hours. The salary for this employee is estimated at the mean salary rate of $24.06 per hour, as set forth for similar office and administrative support positions in the latest State Occupational Employment and Wage Estimates for Texas published by the DOL (May 2009). Additionally, the Department estimates that a member of the health benefit plan issuer's staff can review and approve the prepared information in less than one hour to complete the data certification portion of Form No. LHL616. The salary for this employee is estimated at the mean salary rate of $53.32 per hour, as set forth for similar management positions in the latest State Occupational Employment and Wage Estimates for Texas published by the DOL (May 2009).

Second, proposed §21.4503(1) specifies that the term "group health benefit plan" includes neither a health maintenance organization providing routine dental or vision services as a single health care service plan nor a preferred provider benefit plan providing routine vision services as a routine single health care service plan. As such, neither type of single health care service plan is currently subject to the data collection, preparation, filing, and submission requirements in this proposal, nor will these types of plans incur costs as a result of the enforcement or administration of this proposal.

Third, the Insurance Code §38.353(d)(1) specifies that standard health benefit plans provided under the Insurance Code Chapter 1507 are not subject to the data submission requirements of Chapter 38. Proposed §21.4502(c)(1) incorporates this provision. Proposed §21.4502(d), however, permits a group health benefit plan issuer to electively include data concerning reimbursement rates for standard health benefit plans in its submission of Form No. LHL616. This proposed provision enables health benefit plan issuers who offer standard health benefit plans to avoid the possible expense of separating out claims data for those types of plans if such claims data is otherwise aggregated with the data that is required to be submitted.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in the Government Code §2006.002(b) - (d) for small businesses.

As required by the Government Code §2006.002(c), the Department has determined that proposed new §21.4505 and §21.4506 may have an adverse economic effect on two to five health maintenance organizations (HMOs) and four to seven preferred provider benefit plan issuers (hereafter referred to collectively as group health benefit plan issuers, when appropriate) that qualify as small or micro businesses under the Government Code §2006.001(1) and (2) and that are required to comply with these proposed rules. This estimated number of small and micro businesses is based on an analysis of the financial data collected by the Department, such as the annual gross premiums of licensed HMOs and insurance companies, and on self-reporting by preferred provider benefit plan issuers regarding whether they qualify as small businesses. The adverse economic impact will result from the necessary costs to comply with this proposal that are discussed in the Public Benefit/Cost Note part of this proposal for group health benefit plan issuers that are: (i) collecting and preparing health care reimbursement data as specified in proposed §21.4505; and (ii) submitting the data as specified in proposed §21.4505 and proposed §21.4506. As also discussed in the Public Benefit/Cost Note part of this proposal, the cost components associated with these compliance requirements include: (i) the cost of any additional technology or software necessary to comply with the data collection, preparation, and submission requirements in proposed §21.4505 and §21.4506, including the enrollment information and claims data specified in the proposed Health Care Claims Reimbursement Rate Report form; (ii) personnel costs associated with programming information systems for compliance with the requirements in proposed §21.4505 and §21.4506; and (iii) personnel costs associated with completing and reviewing Form No. LHL616 (Health Care Claims Reimbursement Rate Report) in compliance with the requirements in proposed §21.4505 and §21.4506.

The proposed rules incorporate regulatory provisions designed to reduce potential economic impact for all group health benefit plan issuers, including small and micro businesses. These proposed measures are: (i) a reduced data collection and reporting requirement for those issuers whose plans do not cover more than 10,000 persons pursuant to proposed §21.4505 and §21.4506; (ii) permissive reporting of claim data for standard plans for purposes of administrative convenience pursuant to proposed §21.4502(d); and (iii) inclusion of a shorter reporting period in proposed §21.4505(b).

In developing the data collection and reporting requirements included in proposed §21.4505 and §21.4506, the Department initially considered requiring all group health benefit plan issuers to collect and report data as specified in those proposed sections. However, the Department anticipates that the exclusion of reimbursement data from health benefit plan issuers with enrollment that does not exceed 10,000 persons will not markedly affect the aggregate data. Accordingly, proposed §21.4505 and §21.4506 include a limited exemption based upon enrollment that the Department anticipates may reduce the economic impact of this proposal for small and micro businesses. Proposed §21.4505(c) provides that a health benefit plan issuer that is exempt from filing a full reimbursement report pursuant to §21.4506(e) of the subchapter is not required to collect the full data specified in Form No. LHL616. Instead, such issuer shall collect enrollment data as necessary to comply with the applicable instructions in Part B of Form No. LHL616 to support an exemption. Proposed §21.4506(e) permits group health benefit plan issuers operating under the Insurance Code Chapter 843 or 1301 to submit to the Department an exemption statement and the data required in Form No. LHL616 to support an exemption if the issuer meets the criteria in proposed paragraphs (1) or (2) of proposed §21.4506(e), as applicable. Under these paragraphs, a health benefit plan issuer qualifies for an exemption if the total number of covered lives in private market plans offered by the health benefit plan issuer in Texas does not exceed 10,000 persons as of December 31 of the year preceding the report. The limited exemption in proposed §21.4505(c) and §21.4506(e) applies to private market preferred provider benefit plans operating under the Insurance Code Chapter 1301 and private market health maintenance organizations operating under the Insurance Code Chapter 843, as applicable for each line of business. This limited exemption from specified data collection and reporting requirements in proposed §21.4505 and §21.4506 is available to all group health benefit plan issuers that qualify, including qualifying issuers that are small or micro businesses. While the limited exemption is not directly contingent upon the qualification of the group health benefit plan issuer as a small or micro business pursuant to the Government Code §2006.001, the Department anticipates that small and micro business issuers are more likely

to qualify for the exemption than are larger issuers. A comparison of enrollment data to the data used to estimate the number of insurers and HMOs that qualify as small or micro businesses supports the conclusion that those qualifying small or micro businesses are also likely to qualify for the reduced data collection and reporting requirements permitted under proposed §21.4505 and §21.4506.

As originally considered by the Department, proposed §21.4502(c)(1), concerning applicability, provided that these proposed rules did not apply to standard health benefit plans provided under the Insurance Code Chapter 1507 (standard plans). This provision incorporated the statutory exception in the Insurance Code §38.353(d)(1). However, informal comment from stakeholders at stakeholder meetings indicated that some group health benefit plan issuers maintain aggregated claim data. As a result, it would be costlier for these issuers to segregate claim data for standard plans than to include it. The Department anticipates that inclusion of reimbursement rate data for standard plans will not markedly affect the aggregate data. Accordingly, proposed §21.4502(d) permits a group health benefit plan issuer to electively include the data concerning reimbursement rates for standard plans in its submission of data for purposes of administrative convenience. The Department anticipates that proposed §21.4502(d) may reduce the economic impact of this proposal for all group health benefit plan issuers that issue standard plans, including small and micro businesses.

The Department similarly considered cost implications in determining the period of time for which reimbursement rate data must be collected and submitted, as authorized in the Insurance Code §38.355. The Department has determined that a sample of half of all claims in an applicable calendar year is likely to provide an adequate representation of all reimbursement rates. Accordingly, the Department has also determined that requiring the annual collection and submission of reimbursement rate data for six months per applicable calendar year, January 1 to June 30, will be sufficient to permit comparison of health care reimbursement rates as required in the Insurance Code §38.355(b). The Department anticipates that inclusion of this reduced data collection and submission requirement in proposed §21.4505(b) will lessen the costs of compliance for all group health benefit plan issuers, including small and micro businesses.

The Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. The Government Code §2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses."

The August 21, 2007, bill analysis for SB 1731, as enacted by the 80th Legislature, Regular Session, states that health care costs have risen steadily in recent years. (TEXAS STATE SENATE STATE AFFAIRS COMMITTEE, BILL ANALYSIS (ENROLLED), SB 79, 80TH LEG., R.S. (Aug. 21, 2007)). According to the analysis, these increases have resulted in much discussion and debate among employers, providers, health plans and patients. The bill analysis points out that a "major point of this discussion is the potential for inaccurate information and the absence of transparency in the costs of health care services." The bill analysis concludes that, "The disclosure of this information may help patients to make appropriate and cost effective health care choices." As part of the transparency requirements mandated pursuant to SB 1731, the Insurance Code §38.355 requires each health benefit plan issuer to submit to the Department, at the time and in the form and manner required by the Department, aggregate reimbursement rates by region paid by the health benefit plan issuer for health care services identified by the Department. Section 38.357 requires the Department to provide the aggregated data to the DSHS for publication on the DSHS website. As previously discussed in this Economic Impact Statement, the Department has considered and incorporated into this proposal regulatory provisions that will minimize adverse economic impact upon all group health benefit plan issuers, including small and micro businesses. Nevertheless, the Department considered additional regulatory alternatives as required by the Government Code §2006.002(c)(2). These alternatives include: (i) total exemption of small or micro business group health benefit plan issuers from data collection and reporting requirements in lieu of the reduced data collection and reporting requirement on the basis of reduced enrollment in the proposal; (ii) limited exemption of small or micro business group health benefit plan issuers solely on the basis of their meeting the criteria of a small or micro business pursuant to the Government Code §2006.001; and (iii) reduced frequency requirement for the provision of collection and submission of health care reimbursement data by small or micro business group health benefit plan issuers such as every other year. For the following reasons, the Department rejected each of these alternatives as not being sufficiently consistent with the purpose of the statute or sufficiently protective of the economic welfare of the state, including small and micro businesses.

Total exemption of small or micro businesses from data collection and reporting requirements. The Department has determined that if small and micro business group health benefit plan issuers are exempted from all data collection and reporting requirements, it is possible that the accuracy and reliability of the claims data submitted by the Department to the DSHS and published by that agency would be compromised. Health care rate reimbursement data from an issuer with a large number of covered lives, and therefore likely a more significant quantity of claims, has a greater potential to affect the overall aggregation of data that will be published for purposes of comparison. This is particularly true considering that the data is collected and reported on the basis of eleven specific geographic regions. As previously explained in this Economic Impact Statement, the Department has instead elected in proposed §21.4505 and §21.4506 to permit reduced data collection and reporting on the basis of reduced enrollment. Although the reduced data collection and reporting under this proposal is permitted on the basis of reduced enrollment rather than the group health benefit plan issuer meeting the criteria to qualify as a small or micro business pursuant to the Government Code §2006.001, the Department anticipates that small and micro business issuers will likely qualify for the proposed limited exemption. However, under the proposal, should the qualifying small or micro business issuer provide coverage to a greater number of persons than 10,000 as provided in proposed §21.4506, and thus have a greater likelihood of affecting the aggregated data, the small or micro business issuer will not qualify for the limited exemption. The Department has determined that a total or an unqualified exemption for all small or micro business issuers would not be sufficiently protective of the quality and reliability of the data. As a result, the impaired data would not be consistent with the

intent of the statute to improve the ability of patients to make appropriate and cost effective health care decisions. Further, impaired data would reduce the ability of employers, including small and micro businesses, to accurately compare health care reimbursement data in selecting health benefit plans. As such, the Department has determined that this total exemption regulatory alternative is not sufficiently protective of the economic welfare of the state or sufficiently consistent with the purpose of Chapter 38, Subchapter H of the Insurance Code as enacted in SB 1731 to provide greater accuracy and transparency of health care costs for consumers.

Limited exemption of small or micro businesses solely on the basis of their meeting the criteria of a small or micro business. Reducing the data collection and reporting requirements for group health benefit plan issuers solely on the basis of their meeting the criteria of a small or micro business pursuant to the Government Code §2006.001 could adversely affect the accuracy and reliability of the claims data submitted by the Department to the DSHS for publication. For example, it is possible that a small or micro business issuer could provide coverage to a sufficient number of persons--greater than the 10,000-person requirement in the proposed §21.4505 and §21.4506 limited exemption--that a significant quantity of claims are generated. Absent such data, the data available for purposes of comparison by both employers and patients could be less accurate and therefore less reliable. Therefore, the Department has instead proposed §21.4505 and §21.4506 to permit reduced data collection and reporting on the basis of reduced enrollment, regardless of whether the issuer meets the criteria to qualify as a small or micro business. Although under this proposal the reduced data collection and reporting is permitted on the basis of reduced enrollment rather than whether the issuer meets the criteria to qualify as a small or micro business, the Department anticipates that issuers that meet the criteria as a small or micro business will likely qualify for the limited exemption in proposed §21.4505 and §21.4506. However, under the proposal, should the qualifying small or micro business issuer provide coverage to a number of persons in excess of 10,000 covered lives requirement in proposed §21.4506, and thus have a greater likelihood of affecting the aggregated data, the small or micro business issuer will not qualify for the limited exemption. As a result, such small and micro business issuers claims data will be included in the collected data along with those issuers that do not meet the criteria as a small or micro business pursuant to the Government Code §2006.001. Therefore, the Department has determined that this regulatory alternative is not sufficiently protective of the economic welfare of the state or sufficiently consistent with the purpose of Chapter 38, Subchapter H of the Insurance Code as enacted in SB 1731 to provide greater accuracy and transparency of health care costs for consumers.

Reduced frequency requirement for small or micro businesses to collect and submit data. Permitting small or micro business group health benefit plan issuers to submit health care reimbursement data on a reduced frequency basis could similarly impair the quality and reliability of the data submitted by the Department to the DSHS for publication. As previously discussed, the bill analysis for SB 1731 notes that health care costs have been consistently rising in recent years. This trend increases the importance of collecting data on an annual basis. This is particularly true because this proposal in §21.4505(b) includes a reduced reporting period of six months per year for all group health benefit plan issuers required to comply with the proposal, including small and micro businesses. This proposed reduced reporting requirement provides that the six-month reporting period for data is January 1 to June 30 of the applicable reporting year. Further, because small or micro businesses are likely to be subject to the proposed §21.4505 and §21.4506 limited exemption based upon not exceeding the 10,000 covered lives requirement, the small or micro businesses that would be subject to the reduced frequency reporting requirement would likely have a significant quantity of claims data sufficient to affect the aggregate data for the region or regions in which the small or micro business operates. The Department has determined that absent such data, the quality of data available for purposes of comparison by both employers and patients would be less reliable during the periods of time for which the reduced frequency reporting precluded submission of data. As a result, this regulatory alternative would not be consistent with the intent of the statute to improve the ability of patients to make appropriate and cost effective health care decisions. Therefore, the Department has determined that this regulatory alternative is not sufficiently protective of the economic welfare of the state or sufficiently consistent with the purpose of Chapter 38, Subchapter H of the Insurance Code as enacted in SB 1731 to provide greater accuracy and transparency of health care costs for consumers.

For these reasons, the Department has determined, in accordance with the Government Code §2006.002(c-1), that there are no regulatory alternatives to the proposed requirements in §§21.4501 - 21.4506 that will sufficiently protect the health, safety, environmental, and economic welfare of the state in a manner consistent with the objective and intent of Chapter 38, Subchapter H of the Insurance Code as enacted by SB 1731 and the proposed rule.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on October 11, 2010, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Dianne Longley, Director of Research and Analysis, Life/Health Division, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new sections are proposed under SECTION 19 of SB 1731, as enacted by the 80th Legislature, Regular Session, effective September 1, 2007, and the Insurance Code §§38.351, 38.352, 1301.001, 843.002, 38.353, 38.354, 38.355, 38.357, 38.358, and 36.001. SECTION 19 of SB 1731 mandates that the rules adopted to implement the Insurance Code Chapter 38, Subchapter H (hereafter Subchapter H) must require that each health benefit plan issuer subject to that subchapter make the initial submission of data under that subchapter not later than the 60th day after the effective date of the rules. Section 38.351 provides that the purpose of Subchapter H, to authorize the Department to: (i) collect data concerning

health benefit plan reimbursement rates in a uniform format; and (ii) disseminate, on an aggregate basis for geographical regions in the state, information concerning health care reimbursement rates derived from the data. Section 38.352 provides that in Subchapter H, *group health benefit plan* means a preferred provider benefit plan as defined by §1301.001 or an evidence of coverage for a health care plan that provides basic health care services as defined by §843.002. Section 1301.001 provides at paragraph (9) that *preferred provider benefit plan* means a benefit plan in which an insurer provides, through its health insurance policy, for the payment of a level of coverage that is different from the basic level of coverage provided by the health insurance policy if the insured person uses a preferred provider. Section 1301.001 provides at paragraph (2) that *health insurance policy* means a group or individual insurance policy, certificate, or contract providing benefits for medical or surgical expenses incurred as a result of an accident or sickness. Section 843.002(9) provides that *evidence of coverage* means any certificate, agreement, or contract, including a blended contract, that: (i) is issued to an enrollee; and (ii) states the coverage to which the enrollee is entitled. Section 38.353(e) permits the Commissioner to exclude a type of health benefit plan from the requirements of Subchapter H if the Commissioner finds that data collected in relation to the health benefit plan would not be relevant to accomplishing the purposes of the subchapter. Section 38.354 grants the Commissioner authority to adopt rules as provided by the Insurance Code Chapter 36, Subchapter A, to implement Subchapter H. Section 38.355(a) requires each health benefit plan issuer to submit aggregate reimbursement rates by region paid by the health benefit plan issuer for health care services identified by the Department, in the form and manner and at the time required by the Department. Section 38.355(b) requires that the Department by rule establish a standardized format for the submission of the data submitted under the section to permit comparison of health care reimbursement rates. The subsection also requires the Department, to the extent feasible, to develop the data submission requirements in a manner that allows collection of reimbursement rates as a dollar amount and not by comparison to other standard reimbursement rates. Section 38.355(c) requires the Department to specify the period for which reimbursement rates must be filed. Section 38.357 requires the Department to provide to the Department of State Health Services for publication, for identified regions, aggregate health care reimbursement rate information derived from the data collected under Subchapter H. Section 38.357 also provides that the published information may not reveal the name of any health care provider or health benefit plan issuer and authorizes the Department to make the aggregate health care reimbursement rate information available through the Department's Internet website. Section 38.358 provides that a health benefit plan issuer that fails to submit data as required is subject to an administrative penalty under the Insurance Code Chapter 84. Further, each day the issuer fails to submit the data as required is a separate violation for purposes of penalty assessment. Section 36.001 authorizes the Commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the Department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapter 38, Subchapter H; and Chapters 843, 1301, 1501, 1507, 1551, 1575, 1579, and 1601.

§21.4501. Purpose.

The purpose of this subchapter is to:

(1) prescribe the data collection and submission requirements and form for the submission of data related to health care reimbursement rates by health benefit plan issuers;

(2) specify the definitions necessary to implement the Insurance Code Chapter 38, Subchapter H; and

(3) facilitate the department's provision of aggregate health care reimbursement rate information derived from the data collected under this subchapter to the Department of State Health Services for publication.

§21.4502. Applicability.

(a) This subchapter applies to the issuer of a group health benefit plan as defined in §21.4503 of this subchapter (relating to Definitions), including, as provided by the Insurance Code §38.353(a):

(1) an insurance company;

(2) a group hospital service corporation;

(3) a fraternal benefit society;

(4) a stipulated premium company;

(5) a reciprocal or interinsurance exchange; and

(6) a health maintenance organization.

(b) In accordance with the Insurance Code §38.353(b), and notwithstanding any provision in the Insurance Code Chapter 1551, 1575, 1579, or 1601 or any other law, this subchapter applies to:

(1) a basic coverage plan under the Insurance Code Chapter 1551;

(2) a basic plan under the Insurance Code Chapter 1575;

(3) a primary care coverage plan under the Insurance Code Chapter 1579; and

(4) basic coverage under the Insurance Code Chapter 1601.

(c) Pursuant to the Insurance Code §38.353(d), this subchapter does not apply to:

(1) standard health benefit plans provided under the Insurance Code Chapter 1507;

(2) children's health benefit plans provided under the Insurance Code Chapter 1502;

(3) health care benefits provided under a workers' compensation insurance policy;

(4) Medicaid managed care programs operated under the Government Code Chapter 533;

(5) Medicaid programs operated under the Human Resources Code Chapter 32; or

(6) the state child health plan operated under the Health and Safety Code Chapter 62 or 63.

(d) Notwithstanding subsection (c)(1) of this section, a group health benefit plan issuer is not prohibited from electively including data concerning reimbursement rates for standard health benefit plans provided under the Insurance Code Chapter 1507 in its submission of the report required in §21.4506 of this subchapter (relating to Submission of Report) for purposes of administrative convenience. Data from all other plans identified in subsection (c) of this section shall be excluded from the report.

§21.4503. Definitions.

The following words and terms when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise.

(1) Group health benefit plan--As specified in the Insurance Code §38.352, a preferred provider benefit plan as defined by the Insurance Code §1301.001 or an evidence of coverage for a health care plan that provides basic health care services as defined by the Insurance Code §843.002. The term does not include a health maintenance organization plan providing routine dental or vision services as a single health care service plan or a preferred provider benefit plan providing routine vision services as a single health care service plan.

(2) Institutional provider--An institution providing health care services, including but not limited to hospitals, other licensed inpatient centers, ambulatory surgical centers, skilled nursing centers, and residential treatment centers.

(3) Physician--Any individual licensed to practice medicine in this state and, with regard to a health maintenance organization, as defined in the Insurance Code §843.002(22).

(4) Provider--Any practitioner, institutional provider, or other person or organization that furnishes health care services and that is licensed or otherwise authorized to practice in this state, other than a physician.

(5) Reporting period--The six-month interval of time for which a plan or health benefit plan issuer must submit data, beginning each January 1 and ending the following June 30.

§21.4504. Geographic Regions.

For purposes of data submission pursuant to this subchapter, geographic regions for the reporting of claims are designated as follows:

(1) Region 1--Panhandle, including Amarillo and Lubbock, comprised of the following ZIP Coded areas: 79001, 79002, 79003, 79005, 79007, 79008, 79009, 79010, 79011, 79012, 79013, 79014, 79015, 79016, 79018, 79019, 79021, 79022, 79024, 79025, 79027, 79029, 79031, 79032, 79033, 79034, 79035, 79036, 79039, 79040, 79041, 79042, 79043, 79044, 79045, 79046, 79051, 79052, 79053, 79054, 79056, 79057, 79058, 79059, 79061, 79062, 79063, 79064, 79065, 79066, 79068, 79070, 79072, 79073, 79077, 79078, 79079, 79080, 79081, 79082, 79083, 79084, 79085, 79086, 79087, 79088, 79091, 79092, 79093, 79094, 79095, 79096, 79097, 79098, 79101, 79102, 79103, 79104, 79105, 79106, 79107, 79108, 79109, 79110, 79111, 79114, 79116, 79117, 79118, 79119, 79120, 79121, 79124, 79159, 79166, 79168, 79172, 79174, 79178, 79185, 79187, 79189, 79201, 79220, 79221, 79226, 79229, 79230, 79231, 79233, 79234, 79235, 79236, 79237, 79239, 79240, 79241, 79243, 79244, 79245, 79250, 79251, 79255, 79256, 79257, 79258, 79259, 79261, 79311, 79312, 79313, 79314, 79316, 79320, 79322, 79323, 79324, 79325, 79326, 79329, 79330, 79336, 79338, 79339, 79343, 79344, 79345, 79346, 79347, 79350, 79351, 79353, 79355, 79356, 79357, 79358, 79363, 79364, 79366, 79367, 79369, 79370, 79371, 79372, 79373, 79376, 79378, 79379, 79380, 79381, 79382, 79383, 79401, 79402, 79403, 79404, 79405, 79406, 79407, 79408, 79409, 79410, 79411, 79412, 79413, 79414, 79415, 79416, 79423, 79424, 79430, 79452, 79453, 79457, 79464, 79490, 79491, 79493, and 79499;

(2) Region 2--Northwest Texas, including Wichita Falls and Abilene, comprised of the following ZIP Coded areas: 76228, 76230, 76239, 76251, 76255, 76261, 76265, 76270, 76301, 76302, 76305, 76306, 76307, 76308, 76309, 76310, 76311, 76351, 76352, 76354, 76357, 76360, 76363, 76364, 76365, 76366, 76367, 76369, 76370, 76371, 76372, 76373, 76374, 76377, 76379, 76380, 76384, 76385, 76388, 76389, 76424, 76427, 76429, 76430, 76432, 76435, 76437, 76442, 76443, 76444, 76445, 76448, 76450, 76452, 76454, 76455, 76458, 76459, 76460, 76464, 76466, 76468, 76469, 76470, 76471, 76474, 76481, 76483, 76486, 76491, 76801, 76802, 76803, 76804, 76821, 76823, 76827, 76828, 76834, 76845, 76857, 76861, 76865, 76873, 76875, 76878, 76882, 76884, 76888, 76890, 79223, 79225, 79227, 79247, 79248, 79252, 79501, 79502, 79503, 79504, 79505, 79506, 79508, 79510, 79512, 79516, 79517, 79518, 79519, 79520, 79521, 79525, 79526, 79527, 79528, 79529, 79530, 79532, 79533, 79534, 79535, 79536, 79537, 79538, 79539, 79540, 79541, 79543, 79544, 79545, 79546, 79547, 79548, 79549, 79550, 79553, 79556, 79560, 79561, 79562, 79563, 79565, 79566, 79567, 79601, 79602, 79603, 79604, 79605, 79606, 79607, 79608, 79697, 79698, and 79699;

(3) Region 3--Metroplex, including Fort Worth and Dallas, comprised of the following ZIP Coded areas: 75001, 75002, 75006, 75007, 75009, 75010, 75011, 75013, 75014, 75015, 75016, 75017, 75019, 75020, 75021, 75022, 75023, 75024, 75025, 75026, 75027, 75028, 75029, 75030, 75032, 75034, 75035, 75037, 75038, 75039, 75040, 75041, 75042, 75043, 75044, 75045, 75046, 75047, 75048, 75049, 75050, 75051, 75052, 75053, 75054, 75056, 75057, 75058, 75060, 75061, 75062, 75063, 75065, 75067, 75068, 75069, 75070, 75071, 75074, 75075, 75076, 75077, 75078, 75080, 75081, 75082, 75083, 75085, 75086, 75087, 75088, 75089, 75090, 75091, 75092, 75093, 75094, 75097, 75098, 75099, 75101, 75102, 75104, 75105, 75106, 75109, 75110, 75114, 75115, 75116, 75118, 75119, 75120, 75121, 75123, 75125, 75126, 75132, 75134, 75135, 75137, 75138, 75141, 75142, 75143, 75144, 75146, 75147, 75149, 75150, 75151, 75152, 75153, 75154, 75155, 75157, 75158, 75159, 75160, 75161, 75164, 75165, 75166, 75167, 75168, 75172, 75173, 75180, 75181, 75182, 75185, 75187, 75189, 75201, 75202, 75203, 75204, 75205, 75206, 75207, 75208, 75209, 75210, 75211, 75212, 75214, 75215, 75216, 75217, 75218, 75219, 75220, 75221, 75222, 75223, 75224, 75225, 75226, 75227, 75228, 75229, 75230, 75231, 75232, 75233, 75234, 75235, 75236, 75237, 75238, 75240, 75241, 75242, 75243, 75244, 75245, 75246, 75247, 75248, 75249, 75250, 75251, 75252, 75253, 75254, 75258, 75260, 75261, 75262, 75263, 75264, 75265, 75266, 75267, 75270, 75275, 75277, 75283, 75284, 75285, 75286, 75287, 75301, 75303, 75310, 75312, 75313, 75315, 75320, 75323, 75326, 75334, 75336, 75339, 75340, 75342, 75343, 75344, 75353, 75354, 75355, 75356, 75357, 75358, 75359, 75360, 75363, 75364, 75367, 75368, 75370, 75371, 75372, 75373, 75374, 75376, 75378, 75379, 75380, 75381, 75382, 75386, 75387, 75388, 75389, 75390, 75391, 75392, 75393, 75394, 75395, 75396, 75397, 75398, 75401, 75402, 75403, 75404, 75407, 75409, 75413, 75414, 75418, 75422, 75423, 75424, 75428, 75429, 75438, 75439, 75442, 75443, 75446, 75447, 75449, 75452, 75453, 75454, 75458, 75459, 75474, 75475, 75476, 75479, 75485, 75488, 75489, 75490, 75491, 75492, 75495, 75496, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76010, 76011, 76012, 76013, 76014, 76015, 76016, 76017, 76018, 76019, 76020, 76021, 76022, 76023, 76028, 76031, 76033, 76034, 76035, 76036, 76039, 76040, 76041, 76043, 76044, 76048, 76049, 76050, 76051, 76052, 76053, 76054, 76058, 76059, 76060, 76061, 76063, 76064, 76065, 76066, 76067, 76068, 76070, 76071, 76073, 76077, 76078, 76082, 76084, 76085, 76086, 76087, 76088, 76092, 76093, 76094, 76095, 76096, 76097, 76098, 76099, 76101, 76102, 76103, 76104, 76105, 76106, 76107, 76108, 76109, 76110, 76111, 76112, 76113, 76114, 76115, 76116, 76117, 76118, 76119, 76120, 76121, 76122, 76123, 76124, 76126, 76127, 76129, 76130, 76131, 76132, 76133, 76134, 76135, 76136, 76137, 76140, 76147, 76148, 76150, 76155, 76161, 76162, 76163, 76164, 76166, 76177, 76179, 76180, 76181, 76182, 76185, 76191, 76192, 76193, 76195, 76196, 76197, 76198, 76199, 76201, 76202, 76203, 76204, 76205, 76206, 76207, 76208, 76209, 76210, 76225, 76226, 76227, 76233, 76234, 76238, 76240, 76241, 76244, 76245, 76246, 76247, 76248, 76249, 76250, 76252, 76253, 76258, 76259, 76262, 76263, 76264, 76266, 76267, 76268, 76271, 76272, 76273, 76299, 76401, 76402, 76426, 76431, 76433, 76439, 76446, 76449, 76453, 76461, 76462, 76463, 76465, 76467, 76472, 76475, 76476, 76484, 76485, 76487, 76490, 76623, 76626, 76639, 76641, 76651, 76670, 76679, and 76681;

(4) Region 4--Northeast Texas, including Tyler, comprised of the following ZIP Coded areas: 75103, 75117, 75124, 75127, 75140, 75148, 75156, 75163, 75169, 75410, 75411, 75412, 75415, 75416, 75417, 75420, 75421, 75425, 75426, 75431, 75432, 75433, 75434, 75435, 75436, 75437, 75440, 75441, 75444, 75448, 75450, 75451, 75455, 75456, 75457, 75460, 75461, 75462, 75468, 75469, 75470, 75471, 75472, 75473, 75477, 75478, 75480, 75481, 75482, 75483, 75486, 75487, 75493, 75494, 75497, 75501, 75503, 75504, 75505, 75507, 75550, 75551, 75554, 75555, 75556, 75558, 75559, 75560, 75561, 75562, 75563, 75564, 75565, 75566, 75567, 75568, 75569, 75570, 75571, 75572, 75573, 75574, 75599, 75601, 75602, 75603, 75604, 75605, 75606, 75607, 75608, 75615, 75630, 75631, 75633, 75636, 75637, 75638, 75639, 75640, 75641, 75642, 75643, 75644, 75645, 75647, 75650, 75651, 75652, 75653, 75654, 75656, 75657, 75658, 75659, 75660, 75661, 75662, 75663, 75666, 75667, 75668, 75669, 75670, 75671, 75672, 75680, 75681, 75682, 75683, 75684, 75685, 75686, 75687, 75688, 75689, 75691, 75692, 75693, 75694, 75701, 75702, 75703, 75704, 75705, 75706, 75707, 75708, 75709, 75710, 75711, 75712, 75713, 75750, 75751, 75752, 75754, 75755, 75756, 75757, 75758, 75759, 75762, 75763, 75764, 75765, 75766, 75770, 75771, 75772, 75773, 75778, 75779, 75780, 75782, 75783, 75784, 75785, 75789, 75790, 75791, 75792, 75797, 75798, 75799, 75801, 75802, 75803, 75832, 75839, 75853, 75861, 75880, 75882, 75884, 75886, 75925, and 75976;

(5) Region 5--Southeast Texas, including Beaumont, comprised of the following ZIP Coded areas: 75760, 75788, 75834, 75835, 75844, 75845, 75847, 75849, 75851, 75856, 75858, 75862, 75865, 75901, 75902, 75903, 75904, 75915, 75926, 75928, 75929, 75930, 75931, 75932, 75933, 75934, 75935, 75936, 75937, 75938, 75939, 75941, 75942, 75943, 75944, 75946, 75948, 75949, 75951, 75954, 75956, 75958, 75959, 75960, 75961, 75962, 75963, 75964, 75965, 75966, 75968, 75969, 75972, 75973, 75974, 75975, 75977, 75978, 75979, 75980, 75990, 77326, 77331, 77332, 77335, 77350, 77351, 77359, 77360, 77364, 77371, 77374, 77376, 77399, 77519, 77585, 77611, 77612, 77613, 77614, 77615, 77616, 77619, 77622, 77624, 77625, 77626, 77627, 77629, 77630, 77631, 77632, 77639, 77640, 77641, 77642, 77643, 77651, 77655, 77656, 77657, 77659, 77660, 77662, 77663, 77664, 77670, 77701, 77702, 77703, 77704, 77705, 77706, 77707, 77708, 77709, 77710, 77713, 77720, 77725, and 77726;

(6) Region 6--Gulf Coast, including Houston and Huntsville, comprised of the following ZIP Coded areas: 77001, 77002, 77003, 77004, 77005, 77006, 77007, 77008, 77009, 77010, 77011, 77012, 77013, 77014, 77015, 77016, 77017, 77018, 77019, 77020, 77021, 77022, 77023, 77024, 77025, 77026, 77027, 77028, 77029, 77030, 77031, 77032, 77033, 77034, 77035, 77036, 77037, 77038, 77039, 77040, 77041, 77042, 77043, 77044, 77045, 77046, 77047, 77048, 77049, 77050, 77051, 77052, 77053, 77054, 77055, 77056, 77057, 77058, 77059, 77060, 77061, 77062, 77063, 77064, 77065, 77066, 77067, 77068, 77069, 77070, 77071, 77072, 77073, 77074, 77075, 77076, 77077, 77078, 77079, 77080, 77081, 77082, 77083, 77084, 77085, 77086, 77087, 77088, 77089, 77090, 77091, 77092, 77093, 77094, 77095, 77096, 77097, 77098, 77099, 77201, 77202, 77203, 77204, 77205, 77206, 77207, 77208, 77209, 77210, 77212, 77213, 77215, 77216, 77217, 77218, 77219, 77220, 77221, 77222, 77223, 77224, 77225, 77226, 77227, 77228, 77229, 77230, 77231, 77233, 77234, 77235, 77236, 77237, 77238, 77240, 77241, 77242, 77243, 77244, 77245, 77246, 77247, 77248, 77249, 77250, 77251, 77252, 77253, 77254, 77255, 77256, 77257, 77258, 77259, 77260, 77261, 77262, 77263, 77265, 77266, 77267, 77268, 77269, 77270, 77271, 77272, 77273, 77274, 77275, 77276, 77277, 77278, 77279, 77280, 77282, 77284, 77285, 77286, 77287, 77288, 77289, 77290, 77291, 77292, 77293, 77294, 77296, 77297, 77298, 77299, 77301, 77302, 77303, 77304, 77305, 77306, 77315, 77316, 77318, 77320, 77325, 77327, 77328, 77333, 77334, 77336, 77337, 77338, 77339, 77340, 77341, 77342, 77343, 77344, 77345, 77346, 77347, 77348, 77349, 77353, 77354, 77355, 77356, 77357, 77358, 77362, 77365, 77367, 77368, 77369, 77372, 77373, 77375, 77377, 77378, 77379, 77380, 77381, 77382, 77383, 77384, 77385, 77386, 77387, 77388, 77389, 77391, 77393, 77396, 77401, 77402, 77404, 77406, 77410, 77411, 77412, 77413, 77414, 77415, 77417, 77418, 77419, 77420, 77422, 77423, 77428, 77429, 77430, 77431, 77432, 77433, 77434, 77435, 77436, 77437, 77440, 77441, 77442, 77443, 77444, 77445, 77446, 77447, 77448, 77449, 77450, 77451, 77452, 77453, 77454, 77455, 77456, 77457, 77458, 77459, 77460, 77461, 77463, 77464, 77465, 77466, 77467, 77468, 77469, 77470, 77471, 77473, 77474, 77475, 77476, 77477, 77478, 77479, 77480, 77481, 77482, 77483, 77484, 77485, 77486, 77487, 77488, 77489, 77491, 77492, 77493, 77494, 77496, 77497, 77501, 77502, 77503, 77504, 77505, 77506, 77507, 77508, 77510, 77511, 77512, 77514, 77515, 77516, 77517, 77518, 77520, 77521, 77522, 77530, 77531, 77532, 77533, 77534, 77535, 77536, 77538, 77539, 77541, 77542, 77545, 77546, 77547, 77549, 77550, 77551, 77552, 77553, 77554, 77555, 77560, 77561, 77562, 77563, 77564, 77565, 77566, 77568, 77571, 77572, 77573, 77574, 77575, 77577, 77578, 77580, 77581, 77582, 77583, 77584, 77586, 77587, 77588, 77590, 77591, 77592, 77597, 77598, 77617, 77623, 77650, 77661, 77665, 78931, 78933, 78934, 78935, 78943, 78944, 78950, 78951, and 78962;

(7) Region 7--Central Texas, including Austin and Waco, comprised of the following ZIP Coded areas: 73301, 73344, 75831, 75833, 75838, 75840, 75846, 75848, 75850, 75852, 75855, 75859, 75860, 76055, 76436, 76457, 76501, 76502, 76503, 76504, 76505, 76508, 76511, 76513, 76518, 76519, 76520, 76522, 76523, 76524, 76525, 76526, 76527, 76528, 76530, 76531, 76533, 76534, 76537, 76538, 76539, 76540, 76541, 76542, 76543, 76544, 76545, 76546, 76547, 76548, 76549, 76550, 76554, 76556, 76557, 76558, 76559, 76561, 76564, 76565, 76566, 76567, 76569, 76570, 76571, 76573, 76574, 76577, 76578, 76579, 76596, 76597, 76598, 76599, 76621, 76622, 76624, 76627, 76628, 76629, 76630, 76631, 76632, 76633, 76634, 76635, 76636, 76637, 76638, 76640, 76642, 76643, 76644, 76645, 76648, 76649, 76650, 76652, 76653, 76654, 76655, 76656, 76657, 76660, 76661, 76664, 76665, 76666, 76667, 76671, 76673, 76676, 76678, 76680, 76682, 76684, 76685, 76686, 76687, 76689, 76690, 76691, 76692, 76693, 76701, 76702, 76703, 76704, 76705, 76706, 76707, 76708, 76710, 76711, 76712, 76714, 76715, 76716, 76795, 76797, 76798, 76799, 76824, 76831, 76832, 76844, 76853, 76864, 76870, 76871, 76877, 76880, 76885, 77363, 77426, 77801, 77802, 77803, 77805, 77806, 77807, 77808, 77830, 77831, 77833, 77834, 77835, 77836, 77837, 77838, 77840, 77841, 77842, 77843, 77844, 77845, 77850, 77852, 77853, 77855, 77856, 77857, 77859, 77861, 77862, 77863, 77864, 77865, 77866, 77867, 77868, 77869, 77870, 77871, 77872, 77873, 77875, 77876, 77878, 77879, 77880, 77881, 77882, 78602, 78605, 78606, 78607, 78608, 78609, 78610, 78611, 78612, 78613, 78615, 78616, 78617, 78619, 78620, 78621, 78622, 78626, 78627, 78628, 78630, 78633, 78634, 78635, 78636, 78639, 78640, 78641, 78642, 78643, 78644, 78645, 78646, 78648, 78650, 78651, 78652, 78653, 78654, 78655, 78656, 78657, 78659, 78660, 78661, 78662, 78663, 78664, 78665, 78666, 78667, 78669, 78672, 78673, 78674, 78676, 78680, 78681, 78682, 78683, 78691, 78701, 78702, 78703, 78704, 78705, 78708, 78709, 78710, 78711, 78712, 78713, 78714, 78715, 78716, 78717, 78718, 78719, 78720, 78721, 78722, 78723, 78724, 78725, 78726, 78727, 78728, 78729, 78730, 78731, 78732, 78733, 78734, 78735, 78736, 78737, 78738, 78739, 78741, 78742, 78744, 78745, 78746, 78747, 78748, 78749, 78750, 78751, 78752, 78753, 78754, 78755, 78756, 78757, 78758, 78759, 78760, 78761, 78762, 78763, 78764, 78765, 78766, 78767, 78768, 78769, 78772, 78773, 78774, 78778, 78779, 78780, 78781, 78783, 78785, 78786, 78788, 78789, 78798, 78799, 78932, 78938,

78940, 78941, 78942, 78945, 78946, 78947, 78948, 78949, 78952, 78953, 78954, 78956, 78957, 78960, 78961, and 78963;

(8) Region 8--South Central Texas, including San Antonio, comprised of the following ZIP Coded areas: 76883, 77901, 77902, 77903, 77904, 77905, 77951, 77954, 77957, 77960, 77961, 77962, 77963, 77964, 77967, 77968, 77969, 77970, 77971, 77973, 77974, 77975, 77976, 77977, 77978, 77979, 77982, 77983, 77984, 77986, 77987, 77988, 77989, 77991, 77993, 77994, 77995, 78001, 78002, 78003, 78004, 78005, 78006, 78008, 78009, 78010, 78011, 78012, 78013, 78014, 78015, 78016, 78017, 78019, 78021, 78023, 78024, 78025, 78026, 78027, 78028, 78029, 78039, 78050, 78052, 78054, 78055, 78056, 78057, 78058, 78059, 78061, 78062, 78063, 78064, 78065, 78066, 78069, 78070, 78073, 78074, 78101, 78107, 78108, 78109, 78111, 78112, 78113, 78114, 78115, 78116, 78117, 78118, 78119, 78121, 78122, 78123, 78124, 78130, 78131, 78132, 78133, 78135, 78140, 78141, 78143, 78144, 78147, 78148, 78150, 78151, 78152, 78154, 78155, 78156, 78159, 78160, 78161, 78163, 78164, 78201, 78202, 78203, 78204, 78205, 78206, 78207, 78208, 78209, 78210, 78211, 78212, 78213, 78214, 78215, 78216, 78217, 78218, 78219, 78220, 78221, 78222, 78223, 78224, 78225, 78226, 78227, 78228, 78229, 78230, 78231, 78232, 78233, 78234, 78235, 78236, 78237, 78238, 78239, 78240, 78241, 78242, 78243, 78244, 78245, 78246, 78247, 78248, 78249, 78250, 78251, 78252, 78253, 78254, 78255, 78256, 78257, 78258, 78259, 78260, 78261, 78262, 78263, 78264, 78265, 78266, 78268, 78269, 78270, 78275, 78278, 78279, 78280, 78283, 78284, 78285, 78286, 78287, 78288, 78289, 78291, 78292, 78293, 78294, 78295, 78296, 78297, 78298, 78299, 78604, 78614, 78618, 78623, 78624, 78629, 78631, 78632, 78638, 78658, 78670, 78671, 78675, 78677, 78801, 78802, 78827, 78828, 78829, 78830, 78832, 78833, 78834, 78836, 78837, 78838, 78839, 78840, 78841, 78842, 78843, 78847, 78850, 78852, 78853, 78860, 78861, 78870, 78871, 78872, 78873, 78877, 78879, 78880, 78881, 78883, 78884, 78885, 78886, and 78959;

(9) Region 9--West Texas, including Midland, Odessa, and San Angelo comprised of the following ZIP Coded areas: 76820, 76825, 76836, 76837, 76841, 76842, 76848, 76849, 76852, 76854, 76855, 76856, 76858, 76859, 76862, 76866, 76869, 76872, 76874, 76886, 76887, 76901, 76902, 76903, 76904, 76905, 76906, 76908, 76909, 76930, 76932, 76933, 76934, 76935, 76936, 76937, 76939, 76940, 76941, 76943, 76945, 76949, 76950, 76951, 76953, 76955, 76957, 76958, 78851, 79331, 79342, 79359, 79360, 79377, 79511, 79701, 79702, 79703, 79704, 79705, 79706, 79707, 79708, 79710, 79711, 79712, 79713, 79714, 79718, 79719, 79720, 79721, 79730, 79731, 79733, 79735, 79738, 79739, 79740, 79741, 79742, 79743, 79744, 79745, 79748, 79749, 79752, 79754, 79755, 79756, 79758, 79759, 79760, 79761, 79762, 79763, 79764, 79765, 79766, 79768, 79769, 79770, 79772, 79776, 79777, 79778, 79780, 79781, 79782, 79783, 79785, 79786, 79788, 79789, and 79848;

(10) Region 10--Far West Texas, including El Paso, comprised of the following ZIP Coded areas: 79734, 79821, 79830, 79831, 79832, 79834, 79835, 79836, 79837, 79838, 79839, 79842, 79843, 79845, 79846, 79847, 79849, 79851, 79852, 79853, 79854, 79855, 79901, 79902, 79903, 79904, 79905, 79906, 79907, 79908, 79910, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79920, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79934, 79935, 79936, 79937, 79938, 79940, 79941, 79942, 79943, 79944, 79945, 79946, 79947, 79948, 79949, 79950, 79951, 79952, 79953, 79954, 79955, 79958, 79960, 79961, 79968, 79976, 79978, 79980, 79990, 79995, 79996, 79997, 79998, 79999, 88510, 88511, 88512, 88513, 88514, 88515, 88516, 88517, 88518, 88519, 88520, 88521, 88523, 88524, 88525, 88526, 88527, 88528, 88529, 88530, 88531, 88532, 88533, 88534, 88535, 88536, 88538, 88539, 88540, 88541, 88542, 88543, 88544, 88545, 88546, 88547, 88548, 88549, 88550, 88553, 88554, 88555, 88556, 88557, 88558, 88559, 88560, 88561, 88562, 88563, 88565, 88566, 88567, 88568, 88569, 88570, 88571, 88572, 88573, 88574, 88575, 88576, 88577, 88578, 88579, 88580, 88581, 88582, 88583, 88584, 88585, 88586, 88587, 88588, 88589, 88590, and 88595; and

(11) Region 11--Rio Grande Valley, including Brownsville, Corpus Christi, and Laredo, comprised of the following ZIP Coded areas: 77950, 77990, 78007, 78022, 78040, 78041, 78042, 78043, 78044, 78045, 78046, 78049, 78060, 78067, 78071, 78072, 78075, 78076, 78102, 78104, 78125, 78142, 78145, 78146, 78162, 78330, 78332, 78333, 78335, 78336, 78338, 78339, 78340, 78341, 78342, 78343, 78344, 78347, 78349, 78350, 78351, 78352, 78353, 78355, 78357, 78358, 78359, 78360, 78361, 78362, 78363, 78364, 78368, 78369, 78370, 78371, 78372, 78373, 78374, 78375, 78376, 78377, 78379, 78380, 78381, 78382, 78383, 78384, 78385, 78387, 78389, 78390, 78391, 78393, 78401, 78402, 78403, 78404, 78405, 78406, 78407, 78408, 78409, 78410, 78411, 78412, 78413, 78414, 78415, 78416, 78417, 78418, 78419, 78426, 78427, 78460, 78461, 78463, 78465, 78466, 78467, 78468, 78469, 78470, 78471, 78472, 78473, 78474, 78475, 78476, 78477, 78478, 78480, 78501, 78502, 78503, 78504, 78505, 78516, 78520, 78521, 78522, 78523, 78526, 78535, 78536, 78537, 78538, 78539, 78540, 78541, 78543, 78545, 78547, 78548, 78549, 78550, 78551, 78552, 78553, 78557, 78558, 78559, 78560, 78561, 78562, 78563, 78564, 78565, 78566, 78567, 78568, 78569, 78570, 78572, 78573, 78574, 78575, 78576, 78577, 78578, 78579, 78580, 78582, 78583, 78584, 78585, 78586, 78588, 78589, 78590, 78591, 78592, 78593, 78594, 78595, 78596, 78597, 78598, and 78599.

§21.4505. Requirement to Collect Data.

(a) Each group health benefit plan issuer and plan specified in §21.4502(a) and (b) of this subchapter (relating to Applicability) is required to collect the data specified in Form No. LHL616 (Health Care Claims Reimbursement Rate Report) that is adopted by reference in §21.4507 of this subchapter (relating to Report Form) and is required to prepare and file data in accordance with the requirements in §21.4506 of this subchapter (relating to Submission of Report).

(b) The six-month reporting period for the data requested in Form No. LHL616 (Health Care Claims Reimbursement Rate Report), including the claims and reimbursement rate data, is January 1 to June 30 of the applicable reporting year. The enrollment data required in Form No. LHL616 (Health Care Claims Reimbursement Rate Report) for private market plans and governmental employee plans is for the total number of lives covered under the plans as of both December 31 of the year prior to the applicable reporting period and June 30 of the applicable reporting year.

(c) Notwithstanding subsection (a) of this section, a health benefit plan issuer that is exempt from filing a full reimbursement report pursuant to §21.4506(e) of this subchapter is not required to collect the full data indicated in Form No. LHL616 (Health Care Claims Reimbursement Rate Report) and is required to instead collect enrollment data as necessary to comply with the applicable instructions specified in Form No. LHL616 (Health Care Claims Reimbursement Rate Report) to support an exemption.

§21.4506. Submission of Report.

(a) Not later than September 1 of each year, each plan and health benefit plan issuer identified in §21.4502(a) and (b) of this subchapter (relating to Applicability) is required to submit to the department the data required in Form No. LHL616 (Health Care Claims Reimbursement Rate Report) that is adopted by reference in §21.4507 of this subchapter (relating to Report Form).

(b) Notwithstanding the requirements of subsection (a) of this section, the first reporting date for the submission of data required by this subchapter is 60 days from effective date of this rule for data regarding claims payments from January 1, 2010, to June 30, 2010.

(c) The data filed pursuant to this section is required to be filed electronically in Excel format by:

(1) accessing a link designated on the department's website, http://www.tdi.state.tx.us/forms/form10accident.html, to obtain Form No. LHL616 (Health Care Claims Reimbursement Rate Report);

(2) completing the report in accordance with the form's instructions; and

(3) emailing the completed report to the department at ReimbursementRates@tdi.state.tx.us.

(d) To access the report form, the user must indicate acceptance of the End User Agreement concerning use of Current Procedural Terminology. Acceptance is indicated by clicking the button labeled "Accept." The content of the End User Agreement is provided in Figure: 28 TAC §21.4506(f) of this section.

(e) Notwithstanding subsections (a) - (d) of this section, a group health benefit plan issuer as specified in §21.4502(a) of this subchapter may submit to the department an exemption statement and the data required in Section B of Form No. LHL616 (Health Care Claims Reimbursement Rate Report) to support an exemption in place of the full report described in subsections (a) - (d) of this section. The group health benefit plan issuer asserting an exemption shall certify that the group health benefit plan issuer is exempt from the reporting requirement applicable to its health benefit plans for one of the following reasons:

(1) the total number of all covered lives in private market preferred provider benefit plans operating under the Insurance Code Chapter 1301 and offered by the health benefit plan issuer in Texas does not exceed 10,000 persons as of December 31 of the year preceding the report; or

(2) the total number of all covered lives in the private market health maintenance organization plans operating under the Insurance Code Chapter 843 and offered by the health benefit plan issuer does not exceed 10,000 persons as of December 31 of the year preceding the report.

(f) The content of the End User Agreement is as follows: Figure: 28 TAC §21.4506(f)

§21.4507. Report Form.

Form No. LHL616 (Health Care Claims Reimbursement Rate Report) is adopted by reference. The form:

(1) contains instructions for completion of the report and requires submission of information and data concerning group health benefit plan issuer identification and enrollment information;

(2) requires the submission of both contracted and out-of-network claim information for general professional services; pathology services; anesthesiology services; radiology services; neonatology services; outpatient professional and institutional provider services; and inpatient institutional provider services; and

(3) is available at http://www.tdi.state.tx.us/forms/form10accident.html.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004994
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 291. UTILITY REGULATIONS SUBCHAPTER H. UTILITY SUBMETERING AND ALLOCATION

30 TAC §291.126

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to repeal §291.126.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

In September 1987, the submetering program was transferred by the legislature from the Public Utility Commission (PUC) to the Texas Water Commission, a predecessor agency of the TCEQ. While at the PUC, the submetering program adopted rules to allow an owner to disconnect a tenant's water utility service for non-payment to conform to other PUC rules. When the submetering program was transferred, the Texas Water Commission adopted rules similar to the PUC's, including the provision allowing an owner to disconnect a tenant's water utility service for non-payment. The TCEQ's current rules still contain this provision in Chapter 291, Subchapter H, Utility Submetering and Allocation, §291.126, Discontinuation of Service.

In 1995, the 74th Legislature amended Texas Property Code, §92.008, by passing House Bill (HB) 2803. In 2009, Texas Property Code, §92.008 was amended again when the 81st Legislature passed HB 882. Currently, Texas Property Code, §92.008(b) states that a landlord may not interrupt or cause interruption of water, wastewater, gas, or electric service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Non-payment is not a reason for interruption of service under Texas Property Code, §92.008. Therefore, the commission proposes this rulemaking to ensure that the commission's rules conform with the Texas Property Code.

SECTION DISCUSSION

The commission proposes to repeal §291.126. Section 291.126 provides that a tenant's water utility service may be disconnected if payment was not received by the due date, and the owner issues a disconnection notice after the due date at least ten days

prior to a stated date of disconnection. Texas Property Code, §92.008(b), does not allow a landlord to interrupt water services furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or emergency. Until now, the commission held that its rule did not conflict with the Texas Property Code. However, recent legal analysis by the commission has resulted in the determination that the rule is not consistent with the statute. Specifically, since Texas Property Code, §92.008, only allows for the disconnection of water services that are provided to a tenant by the landlord as an incident of tenancy or by other agreement for the three previous reasons listed, the commission's rule that allows for disconnection due to non-payment is in conflict with this section. To ensure that the commission's rules and the Texas Property Code conform, the commission proposes this repeal.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, analyst in the Strategic Planning and Assessment Section, determined that for the first five-year period the proposed repeal is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed repeal.

The proposed rulemaking would repeal §291.126 that allows an owner to disconnect water utility service to a tenant if payment was not received by the due date. The rulemaking is proposed in order to ensure that the commission's rules do not conflict with the Texas Property Code, §92.008(b). Texas Property Code, §92.008(b) states that a landlord may not interrupt or cause the interruption of water, wastewater, gas, or electric service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Texas Property Code, §92.008(b) resulted from the passage of HB 2803, 74th Legislature and has been in effect since 1995.

Based upon recent legal interpretation, it was determined that submetered and allocated utilities would fall under the provisions of Texas Property Code, §92.008(b) and, therefore, §291.126 would be in conflict with the statute. The repeal of §291.126 is not expected to result in fiscal implications for the agency, water utilities, or other units of state or local government.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed repeal is in effect, the public benefit anticipated from the changes seen in the proposed repeal will be clear and consistent with agency rules.

In general, no significant fiscal implications are anticipated for tenants, landlords, and owners of apartments, condominiums, multiple use facilities, or manufactured home rental communities with submetered or allocated water utilities. It is assumed that landlords and owners have been in compliance with Texas Property Code, §92.008(b). However, some owners and landlords have received agency guidance based on §291.126 that they could disconnect a tenant's water service for non-payment of the tenant's charge for service. For these owners and landlords, as well as for some tenants who may choose to delay or not to pay their water service bills since they are no longer subject to termination of service for non-payment, there may be fiscal implications.

According to agency staff, there are approximately 5,715 apartment houses, condominiums, multiple use facilities, and manufactured home rental communities registered with the agency that provide submetered or allocated water utilities to their tenants. In order to recoup costs from late or non-paying tenants who have submetered water utilities, owners and landlords may have to pursue the use of small claims court or the use of the eviction process, which could result in increased business expenses. There may or may not be costs associated with these actions, and if there are, such costs cannot be estimated at this time. It is not known how many of the landlords, if any, at these facilities may have disconnected water utilities due to non-payment in the past and therefore it is difficult to predict how many landlords may not receive timely payments in the future. In addition, if landlords and owners are not able to disconnect submetered or allocated water utilities due to non-payment, there could be less incentive for them to install or use submetered water utilities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or enforcement of the proposed repeal. There are approximately 5,715 apartment houses, condominiums, multiple use facilities, and manufactured home rental communities that are registered with the agency. It is not known how many of the facilities would be small or micro-businesses. It is not known how many of the landlords at these facilities may have disconnected water utilities due to non-payment in the past and therefore it is difficult to predict how many landlords may not receive timely payments in the future. In order to recoup costs from late or non-paying tenants who have submetered water utilities, owners and landlords may have to pursue the use of small claims court or the use of the eviction process, which could result in increased business expenses. There may or may not be costs associated with these actions, and if there are, such costs cannot be estimated at this time. The proposed rulemaking would repeal §291.126 to ensure that the commission's rules do not conflict with Texas Property Code, §92.008(b). However, because state law controls over any agency regulatory provisions, if there are any adverse fiscal implications for small or micro-businesses, they are not a result of this rulemaking.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does adversely affect small or micro-businesses and is necessary to be consistent with other state law.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is

specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule repeal to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to ensure that the TCEQ rule on disconnection of submetered water utilities conforms with the Texas Property Code on disconnection. Currently, §291.126 allows an owner to disconnect submetered or allocated water utility service for non-payment of that service. Texas Property Code, §92.008(b), states that a landlord may not interrupt water service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Non-payment is not a reason for interruption of service under this statute.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule repeal will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The cost of complying with the proposed repeal is not expected to be significant with respect to the economy.

Furthermore, the proposed rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). There are no federal standards governing submetering in the State of Texas. Second, the proposed rulemaking does not exceed an express requirement of state law. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the proposed rulemaking will be adopted pursuant to the commission's specific authority in Texas Water Code, Chapter 13, Subchapter M. Therefore, the repeal is not adopted solely under the commission's general powers.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed repeal of §291.126 and performed an assessment of whether the proposed repeal constitutes a taking under Texas Government Code, Chapter 2007. The primary purpose of the proposed rulemaking is to ensure that TCEQ rules conform with the Texas Property Code. The proposed rule repeal would substantially advance this purpose by repealing §291.126 to accomplish this conformity.

Promulgation and enforcement of this proposed rule repeal would be neither a statutory nor a constitutional taking of private real property. The proposed repeal does not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property. The proposed rule repeal will primarily affect those owners who have tenants with submetered or allocated water utility service; this would not be an effect on real property. Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed repeal and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed repeal is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 5, 2010 at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-030-291-OW. The comment period closes October 11, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Doug Holcomb, Water Supply Division at (512) 239-6947.

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the TWC; and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. Additionally, TWC, §13.503 states that the commission shall adopt rules and standards under which owners of properties that are not individually metered for water may install submetering equipment for each rental or dwelling unit for the purpose of fairly allocating the cost of each individual rental or dwelling unit's water consumption. Therefore, the TWC authorizes rulemaking that repeals §291.126, which allows an owner to disconnect submetered or allocated water utility service for non-payment of that service.

The proposed repeal implements TWC, §13.503.

§291.126. Discontinuance of Service.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005068
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 239-2548

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.14

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §145.14, concerning action upon review; release to mandatory supervision. The amendments to §145.14 are proposed to clarify the legal time frame during which the TDCJ-Parole Division shall provide written notice to an eligible offender of future consideration for release to mandatory supervision under §508.149, Government Code, in order to provide an offender the opportunity to submit information to the voting panel.

Rissie Owens, Chair of the Board, determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be to bring the rules into compliance with current board practice. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed. No regulatory flexibility analysis required by HB 3430 is necessary.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under §§508.149, 508.0441, and 508.045, Government Code. Section 508.149 provides authority for the discretionary release of offenders on mandatory supervision. Section 508.0441 and §508.045 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to mandatory supervision and to act on matters of release to mandatory supervision.

No other statutes, articles, or codes are affected by these amendments.

§145.14. Action Upon Review; Release to Mandatory Supervision.

(a) (No change.)

(b) If TDCJ-CID determines that release of the offender will occur because the offender will reach the projected release date, the case will be processed as follows:

(1) the offender shall be provided written notice of the discretionary mandatory review and shall have 30 days from the receipt of the notice to submit, in writing, information to the board; and

(2) after the expiration of the 30 day time period, the case shall be referred to a parole panel within who will consider the case for release to mandatory supervision no earlier than 60 [~~shall be referred to a parole panel within 30~~] days of the offender's projected release date [~~for consideration for release to mandatory supervision~~].

(c) Upon considering a case for release to mandatory supervision, a parole panel may:

(1) defer for request and receipt of further information;

(2) vote DMS Month/Year, deny release to mandatory supervision and set the next mandatory supervision review date [~~for review on a future specific month and year. The next mandatory supervision review date shall be set~~] one year from the panel decision date [~~and shall constitute the subsequent projected release date~~]; or

(3) vote RMS, release to mandatory supervision.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005072
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 406-5388

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER C. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE PROCEDURES

43 TAC §1.8, §1.9

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Transportation (department) proposes the repeal of §1.8, Internal Ethics and Compliance Program, and §1.9, Effect of Contractor's Internal Ethics and Compliance Program, concerning other entities' internal ethics and compliance

procedures. The repeal of §1.8 and §1.9 are proposed in association with the adoption of 43 TAC Chapter 9, new Subchapter G and 43 TAC new Chapter 10.

EXPLANATION OF PROPOSED REPEALS

Title 43, Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, and §1.9, Effect of Contractor's Internal Ethics and Compliance Program, became effective February 19, 2009. Section 1.8 establishes, for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program, the minimum requirements of such a program, and requires the entity to certify that it has adopted and enforces compliance with the program. Section 1.9 provides that a contractor's adoption and enforcement of compliance with an internal ethics and compliance program that meets the requirements of §1.8 may be considered in determining a sanction that may be imposed on the contractor.

The substance of §1.8 is transferred to 43 TAC §9.106, which is applicable to entities participating in highway improvement contracts and new 43 TAC §10.51, which is applicable to other entities doing business with the department, in separate rules that are being adopted by the commission.

The substance of §1.9 is integrated into 43 TAC Chapter 9, Contract and Grant Management, and new Chapter 10, Ethical Conduct by Entities Doing Business with the Department. Under §9.110, before imposing a sanction against a contractor, the executive director will consider whether the contractor has adopted a compliance program that satisfies §9.106, and if so, whether the program is being enforced. Under new §10.154, before imposing a score reduction on an individual or entity that provides engineering, architectural, or surveying services, the executive director will consider, as a mitigating factor, the adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of new §10.51. Finally, under §10.254 the executive director will consider the adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of §10.51 as a mitigating factor before imposing a sanction on a person doing business with the department other than a person that provides engineering, architectural, or surveying services.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Steve Simmons, Deputy Executive Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT AND COST

Mr. Simmons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be increased understanding of the application of a framework used to discourage fraudulent and illegal activity by persons with whom the department has financial interactions. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §1.8 and §1.9 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§1.8. Internal Ethics and Compliance Program.

§1.9. Effect of Contractor's Internal Ethics and Compliance Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005049
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

The Texas Department of Transportation (department) proposes the repeal of §§9.100 - 9.117 and simultaneous new §§9.101 - 9.115, Subchapter G, Highway Improvement Contract Sanctions. These repeals and new sections are proposed in association with new 43 TAC Chapter 10, Ethical Conduct by Entities Doing Business with the Department.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

In its effort to emphasize transparency, accountability, and high ethical standards, the department is restructuring its sanction process for violations by highway improvement contractors. This action is taken in conjunction with the proposal of new 43 TAC Chapter 10. To streamline this process the department is repealing the rules relating to the existing sanction process and simultaneously proposing new sections.

The new rules set forth ethical and other requirements that, if violated, may lead to sanctions. The sanction process is changed to be consistent with other department sanctioning processes. Additionally, the new rules create a fair process with more notice of what is considered a violation that could lead to sanction and more opportunity for appeal of a sanction than is provided under the current process.

New §9.101, Purpose and Application of Subchapter, sets forth the purpose of the subchapter, which is to ensure that only responsible contractors are eligible to bid on, enter, and subcontract under highway improvement contracts and that those contracts are fully performed in an efficient and timely manner. The language of existing §9.100 is maintained, as the underlying purpose of protecting the health, welfare, and safety of the traveling public and the state's substantial investment in its system of state highways is unchanged. The new rules further this purpose by improving the sanction process to allow for more notice and opportunity for appeal. Added language stating that the sanctions provided by this subchapter are in addition to other actions and remedies available to the department gives notice that the department is not forfeiting any options legally available.

New §9.102, Definitions, maintains some definitions, alters some definitions, removes some definitions, and adds other definitions to those in current §9.101 in order to correlate with the revised sanction process. The definitions of "commission" and "highway improvement contract" are incorporated without change from existing §9.101. The definitions of "affiliated entity," "assistant executive director," "department," and "reprimand" are added. The definition of "bidding capacity" in current §9.101 is removed because it is no longer relevant to the revised sanction process. The definitions of "contractor," "debarment," "executive director," "sanction," and "suspension" are revised from current §9.101. The definition of "internal compliance process" in current §9.101 is removed from the definitions section, revised, and added to new §9.106, Compliance Program, to give emphasis to its substantive requirements.

New §9.103, Notification of Rules, is incorporated without change from current §9.103.

New §9.104, Delivery of Written Notice or Requests to the Department, clarifies proper methods of delivery of written notices, disclosures, or requests to the department, which are by mail and hand delivery. This ensures timely receipt of written communications to the department.

New §9.105, Act of Individual or Entity Imputed to Contractor, incorporates language from existing §9.106, Responsibility for Acts of Others, but limits when the acts of those acting on behalf of a contractor may be imputed to the contractor. Only conduct of an individual or entity acting on behalf of a contractor that seriously and directly affects the contractor's responsibility to the department may be imputed to the contractor. The purpose of this section is to give notice that a contractor may be sanctioned for acts of those acting on behalf of the contractor, but only in situations where those acts seriously and directly affect the contractor's responsibility to the department.

New §9.106, Compliance Program, incorporates, with changes, the requirements of existing Subchapter G. In the interest of consistency of what is considered an acceptable compliance program to the department, the language of proposed new 43 TAC §10.51, Internal Ethics and Compliance Program, is incorporated into new §9.106.

New §9.107, Grounds for Sanction, provides the grounds for which sanctions may be imposed under the subchapter. New §9.107(1), relating to failure to execute a highway improvement contract after a bid is awarded, and new §9.107(2), relating to rejection by the Texas Transportation Commission (commission) of two or more bids due to bidder error, incorporate the language from existing §9.102(4) and (5), respectively, without change. New §9.107(3) is based on existing §9.102(7) but clarifies that a sanction may be based on the department's declaring a contractor in default on a highway improvement contract, rather than on the contractor's declaration of default.

New §9.107(4) states that sanctions may be imposed for violation of new 43 TAC §10.101, relating to required conduct by entities doing business with the department. New §10.101, concurrently proposed with these rules, sets forth ethical requirements that apply to all entities doing business with the department. The inclusion of violation of this ground for sanction is in line with the department's emphasis on ethical behavior and responsible business conduct.

New §9.108, Procedure, details the method by which sanctions will be imposed. The executive director may impose a sanction on a contractor if a ground for a sanction exists and will impose sanctions in accordance with §9.111(c). Section 9.108(a) and (b) limit the executive director's discretion on when and how to impose a sanction and give notice to contractors of the same. Section 9.108(c) incorporates the substantive content of existing §9.111, Contractual Obligations Unaffected, and specifies that the imposition of a sanction on a contractor does not affect the contractor's obligations under an agreement with the department or limit the department's remedies under the agreement. This preserves the integrity of contractual agreements with the department. Finally, §9.108(d) states that the executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend a contractor without a prior hearing. This incorporates the substantive content of existing §9.110, Suspension. Suspension may be used to protect department resources from being irresponsibly allocated before a sanction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct.

New §9.109, Notice of Sanction, describes the contents of the notice that will be sent to a contractor receiving a sanction. New §9.109 incorporates, with changes, language from existing §9.109. To ensure timely notification, the department will notify the contractor by certified mail within five working days after the date of the executive director's decision to issue a sanction. The notice will state the sanction and the period of the sanction, summarize the facts and circumstances underlying the sanction, explain how the sanction was selected, inform the contractor of the imposition of a suspension if applicable, and finally state that the contractor may appeal the sanction. In the interest of transparency, it is the department's intent for a sanctioned contractor to have full knowledge of the basis of the sanction and how the sanction was decided.

New §9.110, Available Sanctions, describes the sanctions available to the department and also identifies factors that will be considered in imposing the sanction. Available sanctions, in order of increasing severity, are a reprimand, prohibition from participating in a specified agreement, a limit on the contract amount or amount of funds that may be awarded or paid to the contractor, or debarment of the contractor for a period of not more than 60 months. The range of sanctions available allows the department to appropriately address various levels of violations. New §9.110, incorporates, with changes, language from existing §9.104, Referral to Executive Director, and from existing §9.105, Determinations Related to Sanctions, which both discuss factors that will be considered in issuing the sanction. New §9.110 states

that factors that will be considered include the seriousness and willfulness of the act or omission, whether and when the contractor has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the contractor's adoption and enforcement of an internal ethics and compliance program, the contractor's cooperation with the department in the investigation of ethical violations, and the contractor's disassociation from individuals and firms that have been involved in the ethical violation. Allowing the department to consider a range of factors ensures that all aspects of a particular situation can be assessed in assigning a sanction to a violation.

New §9.111, Application of Sanction, sets forth guidelines for application of a sanction by assigning, for specific violations, the sanctions available to the executive director and taking into consideration the factors described in §9.110(b). New §9.111 replaces existing §9.107, Sanction Levels, and §9.108, Application of Sanctions, in describing how the executive director will select and apply a sanction. The guidelines are set forth in a chart format that ties specific sanctions to specific violations based on varying factors. The chart is designed to show the most severe sanction allowable for a specific violation. The executive director may assign a lesser sanction than recommended for a specific violation, but may not assign a more severe sanction than recommended.

New §9.112, Appeal of Sanction, describes the procedure for appeal of a sanction other than a reprimand. A sanction may be appealed to the executive director for an informal hearing. This provision incorporates the informal hearing described in existing §9.112, Opportunity for Informal Hearing. The informal hearing option allows the contractor the opportunity to appeal a sanction in an informal setting that requires minimal time and resource investment. If the contractor is unsatisfied with the decision of the executive director, the contractor may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This provision incorporates the formal hearing described in existing §9.114, Opportunity for Formal Hearing. The contested case hearing option offers the contractor a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the sanction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a sanction and allows a contractor the opportunity to appeal a sanction to a party not involved in the decision to sanction.

Section 9.112(e) also specifies that a reprimand may be appealed by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand. The executive director will make the determination on an appeal and issue a final order. Because a letter of reprimand is the least severe sanction and has minimal implications for a contractor, a more limited opportunity to appeal is appropriate.

Finally, §9.112 states that a sanction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. This provision incorporates the substantive content of existing §9.115, Stay of Sanctions. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed. Staying a sanction during the pendency of an appeal makes certain that a sanction is not unjustly imposed in a situation in which an appeal results in a reversal of a sanction. The automatic stay provided in §9.112(f) does not apply to a suspension or a reprimand.

An order of the executive director under §9.112 is final and not subject to judicial review, unless otherwise provided by law.

New §9.113, Indirect Sanction on an Affiliated Entity, incorporates, with changes, language from existing §9.113, Informal Hearing on Indirect Sanction. The section states that a sanction imposed on a contractor under this subchapter will also be imposed as an indirect sanction on an affiliated entity of the contractor. The affiliated entity will receive notice that states the sanction, summarizes the underlying facts and circumstances, explains how the sanction was selected, informs the affiliated entity of the imposition of a suspension if applicable, and states that the entity may appeal the indirect sanction. The process for an informal hearing before the executive director is incorporated without substantive change from existing §9.113. However, new §9.113 adds the opportunity for an entity to request a hearing before the commission at a regularly scheduled open meeting. The commission may consider oral presentations and written documents presented by the department and interested parties. The chair will set the hearing and the amount of time allowed for presentation. The commission's determination of the appeal will be adopted by minute order, and the executive director will issue a final order on the indirect sanction based on the commission's determination. The opportunity for an appeal to the commission increases due process in the application of a sanction to an affiliated entity, and ensures that the entity is given adequate recourse to refute its status as an affiliated entity.

New §9.114, Lessening or Removal of Sanction, incorporates, with changes, language from existing §9.117. The new section allows a contractor or affiliated entity to request that the executive director reduce or remove a sanction once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a sanction if the circumstances underlying the sanction change and promotes a continuing effort by a sanctioned contractor to address the issues that led to the sanction in the effort to have the sanction lessened or removed.

New §9.115, List of Debarred or Suspended Contractors, incorporates, with changes, language from existing §9.116. New §9.115 states that the department will provide on its website a list of the names of the contractors and their known affiliates and principals who are subject to a sanction other than a reprimand. The name of a contractor and its known affiliates and principals will be added to the list when a final order is issued and will be removed from the list as soon as practicable after the date on which the application of the sanction ends or is removed. The purpose of this section is to inform non-sanctioned contractors and local governments of the contractors that have been sanctioned.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals and new sections as proposed are in effect, there will be no fiscal implications for state or

local governments as a result of enforcing or administering the repeals and new sections.

Steve Simmons, Deputy Executive Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new sections.

PUBLIC BENEFIT AND COST

Mr. Simmons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new sections will be to increase the integrity of department agreements by ensuring contractors adhere to ethical standards of conduct. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on September 22, 2010, in the Ric Williamson Hearing Room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512)305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§9.100 - 9.117 and new §§9.101 - 9.115 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

43 TAC §§9.100 - 9.117

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.100. Purpose.

§9.101. Definitions.

§9.102. Grounds for Sanctions.

§9.103. Notification of Rules.

§9.104. Referral to Executive Director.

§9.105. Determinations Related to Sanction.

§9.106. Responsibility for Acts of Others.

§9.107. Sanction Levels.

§9.108. Application of Sanctions.

§9.109. Notice of Sanctions.

§9.110. Suspension.

§9.111. Contractual Obligations Unaffected.

§9.112. Opportunity for Informal Hearing.

§9.113. Informal Hearing on Indirect Sanction.

§9.114. Opportunity for Formal Hearing.

§9.115. Stay of Sanctions.

§9.116. List of Debarred or Suspended Contractors.

§9.117. Request for Review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005050
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

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43 TAC §§9.101 - 9.115

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.101. Purpose and Application of Subchapter.

(a) It is the policy of the Texas Transportation Commission to protect the health, welfare, and safety of the traveling public and the state's substantial investment in its system of state highways. This policy requires procedures to ensure that only responsible contractors are eligible to bid on, enter, and subcontract under highway improvement contracts and that those contracts are fully performed in an efficient and timely manner.

(b) The sanctions provided by this subchapter are in addition to other actions and remedies available to the department.

§9.102. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliated entity--An entity, regardless of when formed, that has the same or similar management, ownership, or principal employees as the sanctioned or suspended contractor.

(2) Assistant executive director--An assistant executive director of the Texas Department of Transportation.

(3) Commission--The Texas Transportation Commission.

(4) Contractor--An entity that is eligible to bid on a highway improvement contract or that functions or seeks to function as a subcontractor under a highway improvement contract or as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system.

(5) Debarment--Disqualification of a contractor from entering into an agreement with a state or federal agency.

(6) Department--The Texas Department of Transportation.

(7) Executive director--The executive director of the Texas Department of Transportation.

(8) Highway improvement contract--A contract entered under Transportation Code, Chapter 223, Subchapter A for the construction, reconstruction, or maintenance of a segment of the state highway system, or for the construction or maintenance of a building or other facility appurtenant to a building.

(9) Reprimand--A written warning issued by the department that documents an act or omission committed by a contractor.

(10) Sanction--A consequence imposed on a contractor for failure to comply with this subchapter including suspension, reprimand, prohibition against participation in a specified agreement, or debarment.

(11) Suspension--Immediate, temporary disqualification of a contractor from entering into or attempting to enter into an agreement with the department.

§9.103. Notification of Rules.

The department will send a copy of this subchapter to each prequalified contractor. The department's failure to comply with this section does not affect the applicability of this subchapter.

§9.104. Delivery of Written Notice or Requests to the Department.

For the purposes of this chapter, written notice, disclosures, or requests may be delivered to the department by:

(1) sending the document by United States mail or by overnight delivery service to: Executive Director, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; or

(2) hand delivering the document to: Executive Director, Texas Department of Transportation, 125 East 11th Street, Austin, Texas.

§9.105. Act of Individual or Entity Imputed to Contractor.

The conduct of an individual or entity acting on behalf of a contractor that seriously and directly affects the contractor's responsibility to the department may be imputed to the contractor.

§9.106. Compliance Program.

(a) To be considered as having a compliance program for purposes of this chapter, the contractor must certify to the department that the contractor:

(1) has adopted an internal ethics and compliance program that:

(A) is designed to detect and prevent violations of the law, including regulations, and ethical standards applicable to the entity or its officers or employees; and

(B) satisfies the requirements of this section; and

(2) enforces compliance with its internal ethics and compliance program.

(b) A contractor's internal ethics and compliance program must be in writing and must provide compliance standards and procedures that the entity's employees and agents are expected to follow. At a minimum, the program must provide that:

(1) high-level personnel are responsible for oversight of compliance with the standards and procedures;

(2) appropriate care is being taken to avoid the delegation of substantial discretionary authority to individuals whom the organization knows, or should know, have a propensity to engage in illegal activities;

(3) compliance standards and procedures are effectively communicated to all of the organization's employees by requiring them to participate in training and disseminating to them information that explains, in understandable language, the requirements of the program;

(4) the governing body or individuals of the organization have periodic training in ethics and in the compliance program;

(5) compliance standards and procedures are effectively communicated to all of the organization's agents;

(6) reasonable steps are being taken to achieve compliance with the compliance standards and procedures by:

(A) using monitoring and auditing systems that are designed to reasonably detect noncompliance; and

(B) providing and publicizing a system for the organization's employees and agents to report suspected noncompliance without fear of retaliation;

(7) consistent enforcement of compliance standards and procedures is administered through appropriate disciplinary mechanisms;

(8) reasonable steps are being taken to respond appropriately to detected offenses and to prevent future similar offenses; and

(9) the organization has a written employee code of conduct that, at a minimum, addresses:

(A) record retention;

(B) fraud;

(C) equal opportunity employment;

(D) sexual harassment and sexual misconduct;

(E) conflicts of interest;

(F) personal use of the organization's property; and

(G) gifts and honoraria.

(c) The department may, at its discretion, request that the contractor provide the department with written evidence of the contractor's internal ethics and compliance program.

§9.107. Grounds for Sanction.

Sanctions may be imposed under this section for:

(1) failure to execute a highway improvement contract after a bid is awarded, unless the contractor honors a bid guaranty submitted under §9.14(d) of this chapter (relating to Submittal of Bid);

(2) the rejection by the commission of two or more bids by the contractor during the 36-month period preceding the month in which the determination is being made because of contractor error;

(3) the department's declaration of a contractor in default on a highway improvement contract; or

(4) violation of §10.101 of this title (relating to Required Conduct).

§9.108. Procedure.

(a) The executive director may impose a sanction on a contractor if a ground for a sanction under §9.107 of this subchapter (relating to Grounds for Sanction) exists. The executive director will impose sanctions under this subchapter in accordance with §9.111(c) of this subchapter (relating to Application of Sanction).

(b) Except as provided in §9.112(g) of this subchapter (relating to Appeal of Sanction), a sanction is effective on the date specified in the notice of sanction under §9.109 of this subchapter (relating to Notice of Sanction).

(c) The imposition of a sanction on a contractor does not affect the contractor's obligations under an agreement with the department or limit the department's remedies under the agreement.

(d) The executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend a contractor without a prior hearing. Before imposing a suspension, the executive director will consider all relevant circumstances, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order is entered under §9.112(e) of this subchapter.

§9.109. Notice of Sanction.

If the executive director imposes a sanction under this subchapter, the department will notify the contractor by certified mail within five working days after the date of the executive director's decision. The notice will:

(1) state the sanction and the period of the sanction, if applicable;

(2) summarize the facts and circumstances underlying the sanction;

(3) explain how the sanction was selected, using §9.111(c) of this subchapter (relating to Application of Sanction) as a basis for explanation;

(4) if applicable, inform the contractor of the imposition of a suspension under §9.108(d) of this subchapter (relating to Procedure); and

(5) state that the contractor may appeal the sanction in accordance with §9.112 of this subchapter (relating to Appeal of Sanction).

§9.110. Available Sanctions.

(a) The available sanctions, in order of increasing severity, are:

(1) a reprimand;

(2) prohibition from participating in a specified agreement, whether the agreement was previously awarded or to be awarded or whether funds under the agreement have been paid or are to be paid;

(3) a limit on the contract amount or amount of funds that may be awarded or paid to the contractor for a period of not more than 60 months; or

(4) debarment of the contractor for a period of not more than 60 months.

(b) Before imposing a sanction, the executive director will consider:

(1) the seriousness and willfulness of the act or omission;

(2) whether the contractor has committed similar acts or omissions and if so, when those acts or omissions were committed;

(3) whether the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions; and

(4) any mitigating factors.

(c) For the purposes of subsection (b)(4) of this section, the following are mitigating factors:

(1) the contractor's adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of §9.106 of this subchapter (relating to Compliance Program);

(2) the contractor's cooperation with the department in the investigation of ethical violations, including the provision of a full and complete account of the contractor's involvement; or

(3) the contractor's disassociation from individuals and firms that have been involved in the ethical violation.

§9.111. Application of Sanction.

(a) The executive director, at the executive director's sole discretion, may impose a sanction that is less severe, but not more severe, than the sanction recommended under subsection (c) of this section.

(b) If a contractor commits multiple violations arising out of separate occurrences, the executive director may impose multiple sanctions in accordance with subsection (c) of this section.

(c) Figure 43 TAC §9.111(c) sets forth guidelines for application of a sanction by assigning, for specific violations of §9.107 of this subchapter (relating to Grounds for Sanction), the sanctions available to the executive director as described in §9.110(a) of this subchapter (relating to Available Sanctions), taking into consideration the factors described in §9.110(b) of this subchapter.
Figure: 43 TAC §9.111(c)

§9.112. Appeal of Sanction.

(a) A sanction, other than a reprimand, and unless ordered or directed by the federal government, may be appealed to the executive

director by delivering to the executive director a written notice of appeal within 10 working days after the effective date of the sanction as specified in the notice of sanction. If the notice of appeal is timely delivered, the contractor will be given the opportunity for an informal hearing before the executive director. The executive director will set a time for the hearing at the executive director's earliest convenience. The executive director will set time allowed for oral presentations and written documents presented by the contractor. The executive director will notify the contractor in writing within 5 working days of the executive director's determination on the appeal.

(b) If the contractor is dissatisfied with the determination of the executive director, the contractor may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Case). To be effective the request must be received by the executive director within 10 working days after the date that the executive director mails the notification of determination under subsection (a) of this section.

(c) The administrative law judge's proposal for decision resulting from the administrative hearing will be presented to the commission at a regularly scheduled open meeting. The commission may consider oral presentations. The commission will make a determination based on the proposal for decision. The commission's determination on the proposal for decision will be adopted by minute order and reflected in the minutes of the meeting.

(d) If an appeal to the executive director or by an administrative hearing, as appropriate, is not timely requested under this section, the executive director will issue a final order imposing the sanction when the deadline for requesting an appeal has passed. If an appeal is timely requested, the executive director will issue a final order based on one of the following:

(1) the executive director's determination under subsection (a) of this section; or

(2) the commission's determination under subsection (c) of this section.

(e) If the only sanction being imposed is a reprimand, the contractor may appeal the reprimand by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand within 10 working days after the effective date of the sanction as specified in the notice of sanction. The executive director will make the determination on an appeal and issue a final order under this subsection.

(f) A sanction, other than a suspension or a reprimand, is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed.

(g) The order of the executive director issued under subsection (e) of this section is final and not subject to judicial review, except as required by law.

§9.113. Indirect Sanction on an Affiliated Entity.

(a) A sanction imposed on a contractor under this subchapter will also be imposed as an indirect sanction on an affiliated entity of the contractor.

(b) The affiliated entity will receive notice of the indirect sanction that will:

(1) state the sanction and the period of the sanction, if applicable;

(2) summarize the facts and circumstances underlying the sanction;

(3) explain how the sanction was selected, using §9.111(c) of this subchapter (relating to Application of Sanction) as a basis for explanation;

(4) if applicable, inform the affiliated entity of the imposition of a suspension under §9.108(d) of this subchapter (relating to Procedure); and

(5) state that the affiliated entity may appeal the indirect sanction in accordance with subsection (c) of this section.

(c) An affiliated entity, in accordance with this subsection, may petition the executive director for an informal hearing on the imposition of an indirect sanction or suspension that is imposed on the affiliated entity solely because of its status as an affiliated entity.

(1) Not later than the 30th day after the date of receipt of the written request, the executive director will hold an informal hearing with the affiliated entity to discuss the relationship associated with the affiliation.

(2) Within 15 days after the date the informal hearing is held, the department will conduct a review to determine the affiliation of the entities. The review will include, but is not limited to, consideration of the entities':

(A) intercompany transactions;

(B) equipment;

(C) personnel;

(D) office space;

(E) finances; and

(F) other affiliation criteria.

(3) The executive director will consider the evidence presented and inform the affiliated entity in writing within 30 days of the informal hearing of the final determination to continue or lift the indirect sanction or suspension.

(4) The executive director may grant an exception to the indirect sanction only if the department finds that the operations and control of an affiliated entity affected by an indirect sanction are independent from the directly sanctioned entity.

(5) The granting of a sanction or suspension exception does not remove the affiliation classification between the affected business entities.

(6) The department may conduct follow-up reviews and may recommend that the executive director revoke the exception if the department determines that the affiliated entities are no longer independent.

(d) If the executive director does not grant or revoke an exception and determines to continue an indirect sanction or suspension, the affiliated entity may request the opportunity for a hearing before the commission at a regularly scheduled open meeting.

(1) The commission may consider oral presentations and written documents presented by the department and interested parties. The chair will set the hearing and the amount of time allowed for presentation.

(2) The commission's determination of the appeal will be adopted by minute order and reflected in the minutes of the meeting.

(3) The executive director will issue a final order on the indirect sanction based on the commission's determination.

§9.114. Lessening or Removal of Sanction.

(a) A contractor or affiliated entity may request the reduction or removal of a sanction imposed under this subchapter by delivering to the executive director the request in writing and written documentation in support of the request demonstrating changes in the circumstances that were described in the notice of sanction under §9.109 or §9.113(b) of this subchapter (relating to Notice of Sanction and Indirect Sanction on an Affiliated Entity, respectively).

(b) The executive director, at the executive director's sole discretion, may decide to reduce or remove the sanction. The executive director will send a written notice of the decision to the contractor or affiliated entity.

(c) The executive director will consider not more than one request under this section during any 12-month period.

§9.115. List of Debarred or Suspended Contractors.

(a) The department will provide on its website a list of the names of the contractors and their known affiliates and principals who are subject to a sanction other than a reprimand under this subchapter.

(b) The name of a contractor and its known affiliates and principals will be added to the list when a final order is issued under §9.112(e) of this subchapter (relating to Appeal of Sanction) and will be removed from the list as soon as practicable after the date on which the application of the sanction ends or is removed.

(c) The name of a contractor and its known affiliates and principals will be added to the list immediately after the executive director suspends a contractor under §9.108(d) of this subchapter (relating to Procedure).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005051
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

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CHAPTER 10. ETHICAL CONDUCT BY ENTITIES DOING BUSINESS WITH THE DEPARTMENT

The Texas Department of Transportation (department) proposes new Chapter 10, Ethical Conduct by Entities Doing Business with the Department, new Subchapter A, General Provisions, new §§10.1 - 10.7, New Subchapter B, Other Entities' Internal Ethics and Compliance Procedures, §10.51, new Subchapter C, Required Conduct by Entities Doing Business with the Department, new §10.101 and §10.102, new Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers, new §§10.151 - 10.160, new Subchapter E, Removal of Precertification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, new §§10.201 - 10.206, new Subchapter F, Sanctions for Ethical Violations by Other Entities, new §§10.251 - 10.257. These new sections are proposed in association with new 43 TAC §§9.101 - 9.115.

EXPLANATION OF PROPOSED NEW SUBCHAPTER

In its effort to emphasize transparency, accountability, and ethical standards, the department proposes new rules to establish conduct requirements for entities that do business with the department and to describe what measures may be taken in response to violations.

The new rules set forth ethical and other requirements that, if violated, may lead to disciplinary actions and sanctions. They create enforcement provisions that correspond with different types of violations to provide clear notice of what an action's consequences will be and also describe how to appeal the enforcement action.

The proposed sections will only apply to agreements signed or extended on or after the effective date of the rules.

New §10.1, Purpose, sets forth the purpose of the subchapter, which is to prescribe the ethical conduct required of entities that do business with the department and to describe how violations will be enforced. Enforcement provisions for ethical violations by a contractor who is subject to 43 TAC Chapter 9, Subchapter G, Highway Improvement Contract Sanctions are provided under that chapter rather than under new Chapter 10. Chapter 10 does not apply to the federal government. The requirements and enforcement measures of the chapter supplement other applicable provisions. The latter provision gives notice that the department may use all remedies legally available to it.

New §10.2, Definitions, provides definitions for terms associated with conduct requirements and enforcement provisions. The definition of debarment is among those provided in the section, and states that debarment is disqualification of an entity from bidding on or entering into a contract with the department, from participating as a subcontractor under a contract with the department, and from participating as a supplier of materials or equipment to be used under a contract with the department, so that debarment applies to an entity no matter what function the entity is attempting to undertake in an agreement with the department.

New §10.3, Delivery of Written Notice, Disclosures, or Requests to the Department, clarifies the proper methods of delivery of written notices, disclosures, and requests to the department, which are by mail and hand delivery. This ensures timely receipt of written communications to the department.

New §10.4, Act of Individual Imputed to Entity, limits when acts of those acting on behalf of an entity may be imputed to the entity. Only conduct of an individual acting on behalf of an entity that seriously and directly affects the entity's responsibility to the department may be imputed to the entity. The purpose of this section is to give notice that an entity may be sanctioned for acts of those acting on behalf of the entity, but only in situations where those acts seriously and directly affect the entity's responsibility to the department.

New §10.5, Benefit, defines a benefit as anything that is reasonably regarded as financial gain or advantage, including something given to another person in whose welfare the beneficiary has a direct interest. It also describes what items are not considered benefits for purposes of the chapter. In order to protect the integrity of department agreements, it is the department's intent that its employees not be influenced by being offered things described as a benefit under this section.

New §10.6, Conflict of Interest, describes a conflict of interest as a circumstance arising out of an entity's existing or past activities, business interests, contractual relationships, or organizational structure, or a familial or domestic living relationship between a department employee and an employee of the entity, that affects or may affect the entity's objectivity in performing the scope of work sought by the department, or that provides or may reasonably appear to provide an unfair competitive advantage to an entity or a third party in the entity's performance of services for the department or participation in an agreement with the department. As stewards of public resources, the department has a vested interest in ensuring that both impropriety and the perception of impropriety are avoided.

New §10.7, Delegation of Authority, describes how and to whom the executive director and assistant executive director may delegate the authority given to them under this chapter. The executive director may delegate to AN assistant executive director any authority provided to the executive director under this chapter, unless otherwise provided. The assistant executive director may delegate to an employee of the department who is not below the level of district engineer, division director, or office director any authority provided to the assistant executive director under this chapter, unless otherwise provided.

New §10.51, Internal Ethics and Compliance Program, is proposed without change from existing §1.8, Internal Ethics and Compliance Program. In the interest of organization, the section has been removed from 43 TAC Chapter 1, Subchapter C, Other Entities' Internal Ethics and Compliance Procedures, and inserted into new Chapter 10. This allows for easy subject matter reference and location of the rules.

New §10.101, Required Conduct, lists requirements to which entities must adhere. Entities must disclose conflicts of interest, refrain from offering benefits to department employees or commissioners, and obey all applicable laws. An entity must also maintain good standing with the state's comptroller of public accounts, and must notify the department of, as well as adequately address, a business-related conviction or judgment against the entity, debarment for a reason related to business integrity, or a violation of the law, department rules, or the entity's internal compliance program if that violation seriously and directly affects the entity's responsibility to the department. This section provides notice as to exactly what ethical standards of conduct the department requires entities follow. High ethical standards are essential in promoting transparency, accountability, and responsible use of department resources.

New §10.102, Grounds for Sanctions, provides that an entity's violation of the conduct requirements is a ground for an enforcement action. Allowing the department to impose an enforcement action on an entity ensures that the required conduct will be adhered to by entities doing business with the department.

New §10.151, Definitions, provides definitions for Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers.

New §10.152, Score Reduction for Ethical Violations, states that if a service provider violates the conduct requirements, the executive director may reduce the provider's points total under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. This section states the manner in which enforcement action will be taken against service providers. The section also states that this action is in addition to other actions available to the department. The latter provision gives notice that the department is not forfeiting any options legally available.

New §10.153, Member Score Reduction Applied to Team, provides that if any member of a team has the member's score reduced under this subchapter, then the score reduction applies to all submissions made by the team under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. Holding a team accountable for the actions of its team members provides an additional level of protection of the department's interest in doing business with ethical providers.

New §10.154, Factors Considered in Imposing Score Reduction, describes the factors that the executive director will consider in imposing a score reduction. Factors to be considered include the seriousness and willfulness of the act or omission, whether and when the provider has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the provider's adoption and enforcement of an internal ethics and compliance program, the provider's cooperation with the department in the investigation of ethical violations, and the provider's disassociation from individuals and firms that have been involved in the ethical violation. Allowing the department to consider a range of factors ensures that all aspects of a particular situation can be assessed in imposing a score reduction in response to a violation.

New §10.155, Account and Period of Score Reduction, sets forth guidelines for application of a score reduction by recommending, for specific violations, the percentage and period of a score reduction available to the executive director, taking into consideration the mitigating factors described in §10.154(b). The guidelines are set forth in a chart format that ties recommended score reduction percentages and lengths of time to specific violations based on varying factors. The chart is designed to show the most severe score reduction allowable for a specific violation. The executive director may assign a lesser score reduction than recommended for a specific violation, but may not assign a more severe score reduction than recommended. The process provides notice as to a provider's recommended reduction while also granting limited discretion to the department.

New §10.156, Notice of Score Reduction, describes the contents of the notice that will be sent to a service provider receiving a score reduction. In order to ensure timely notification, the department will notify the provider by certified mail within five working days after the date of the assistant executive director's decision to issue a sanction. The notice will state the percentage of score reduction and the period during which it will be imposed, summarize the facts and circumstances underlying the reduction, explain how the percentage of score reduction and time period of the reduction were determined using Figure: 43 TAC §10.155(b), inform the provider of the imposition of a suspension if applicable, and state that the provider may appeal the score reduction. In the interest of transparency, it is the department's intent for a sanctioned service provider to have full knowledge of the basis of the score reduction and how the score reduction and period of imposition were decided.

Section 10.156 also states that the executive director, concurrent with the delivery of the notice of a score reduction, may suspend a service provider. Suspension protects department resources from being irresponsibly allocated before a score reduction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the

severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order imposing the score reduction is entered.

Finally, §10.156 specifies that the imposition of a score reduction on a service provider does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement. This provision preserves the integrity of contractual agreements with the department.

New §10.157, Application of Score Reduction, provides that the score reduction will be applied to each letter of interest submittal under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services. It states that the score reduction will be applied at the earliest of the following steps in the selection process: (1) on assignment of the score at the long list evaluation; (2) on assignment of the score at the short list proposal evaluation; (3) on assignment of the score at the interview evaluation; or (4) on preparation of a contract evaluation summary. This procedure allows the department to consider an ethical violation at the earliest possible step after which it is decided to impose a score reduction.

New §10.158, Appeal of Score Reduction, describes the procedure for appeal of a score reduction. A score reduction may be appealed to the executive director for an informal hearing. This option allows the provider the opportunity to appeal a score reduction in an informal setting that requires minimal time and resource investment. If the provider is unsatisfied with the decision of the executive director, the provider may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This option offers the provider a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the score reduction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a score reduction and allows a provider the opportunity to appeal a sanction.

Finally, §10.158 states that a score reduction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the score reduction, the full term of the score reduction will be imposed on the date of the final order unless the executive director expressly orders that a lesser score reduction be imposed. Staying a score reduction during the pendency of an appeal makes certain that a score reduction is not unjustly imposed in a situation in which an appeal results in a reversal of a score reduction. An order of the executive director under §10.158 is not subject to judicial review unless otherwise provided by law.

New §10.159, Lessening or Removal of Score Reduction, allows a provider to request that the executive director reduce or remove a score reduction by demonstrating changes in circumstances that were described in the notice of score reduction under §10.156. The executive director will consider a provider's request not more than once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a score reduction if the circumstances underlying the score reduction change and promotes a continuing effort by a sanctioned provider to address the issues that led to the score reduction in the effort to have the score reduction lessened or removed.

New §10.160, Publication of Names of Providers Receiving Score Reductions, provides that the department will publish a list on its website of the names of providers who are subject to score reductions. The names will be added when the reduction becomes effective and will be removed as soon as practicable after the date on which the score reduction imposition ends. This provision allows the public to know which service providers have been found to have engaged in unethical conduct and illustrates the department's commitment to holding its providers accountable to a high standard of conduct.

New §10.201, Purpose, sets forth the purpose of Subchapter E, Removal of Precertification of Architectural, Engineering, and Surveying Service Providers for Ethical Violations, which is to provide a procedure by which an architectural, engineering, or surveying service provider's precertification can be removed by the assistant executive director if a ground for removal under §10.101 exists. This procedure ensures that only responsible persons are precertified to enter into certain contracts with the department.

New §10.202, Factors Considered in Removing Precertification, describes the factors that the assistant executive director will consider before removing a person's precertification. Factors that will be considered include the seriousness and willfulness of the act or omission, whether and when the person has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors including the person's cooperation with the department in the investigation of ethical violations, and the person's disassociation from individuals and firms that have been involved in the ethical violation. The department's consideration of multiple factors means that all aspects of a particular situation can be assessed before a person's precertification is removed.

New §10.203, Time Period of Prohibition from Reapplying for Precertification, sets forth guidelines for application of a certain period during which a person is prohibited from reapplying for precertification. The guidelines are set forth in a chart format that ties specific periods of prohibition to specific violations based on varying factors. The chart is designed to show the most severe period of prohibition from reapplying for precertification that is allowable for a specific violation. The assistant executive director may prohibit a person from reapplying for precertification for a lesser period than recommended for a specific violation, but may not prohibit reapplication for a longer period than recommended. The process provides notice as to a provider's recommended period of prohibition while also granting limited discretion to the department.

New §10.204, Notice of Removal of Precertification, describes the contents of the notice that will be sent to a person whose precertification is removed. In order to ensure timely notification, the department will notify the person by certified mail within five working days after the date of the assistant executive director's decision to remove precertification. The notice will state the period during which the person is prohibited for applying for precertification, summarize the facts and circumstances underlying the removal of precertification, explain how the period of prohibition was determined using Figure: 43 TAC §10.203, and state that the person may appeal the removal of precertification. It

is the department's intent to promote transparency by ensuring that a person has full knowledge of the basis of a precertification removal and how the period of prohibition was decided.

Section 10.204 also states that the executive director, concurrent with the delivery of the notice of a precertification removal, may suspend a person from participating in agreements with the department. Suspension protects department resources from being irresponsibly allocated before precertification is finally removed. In order to ensure that a suspension is not unnecessarily imposed, the assistant executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order removing the precertification is entered.

Finally, §10.204 specifies that removal of precertification does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement. This preserves the integrity of contractual agreements with the department. Additionally, unless the person is suspended, precertification removal does not prevent the person from participating in agreements with the department in a capacity that does not require precertification status. This clarifies that a person is not prohibited from participating in agreements with the department, but if the person does participate in an agreement with the department, it must be in a capacity that does not require precertification.

New §10.205, Appeal of Removal of Precertification, describes the procedure for appeal of precertification removal. Removal may be appealed to the executive director by submitting documentation with the notice for appeal or by requesting an in-person meeting with the executive director. At the meeting, the person may present written documentation and oral testimony, and may answer questions from the executive director. The executive director will issue a final order after considering all documentation and testimony. The final order is not subject to judicial review, except as required by law. Additionally, the executive director may not delegate authority under this section. Providing for appeal to the executive director ensures that a person has the ability to contest the removal of precertification if the person so desires, and that the executive director may change the removal of precertification if the situation so dictates.

New §10.206, Eligibility to Reapply for Precertification, allows a person to request that the assistant executive director reduce or remove a period of prohibition for precertification by demonstrating changes in the circumstances that were described in the notice of score reduction The assistant executive director will consider a provider's request not more than once in a 12-month period. This provision ensures that the assistant executive director will have the ability to lessen or remove a period of prohibition if there is a change in the circumstances that led to precertification removal and encourages persons to remedy the problems that led to precertification removal in the effort to have a period of prohibition lessened or removed.

New §10.251, Application of Subchapter, provides that Subchapter F, Sanctions for Ethical Violations by Other Entities, only applies to entities or individuals doing business with the department that are subject to Chapter 10 but are not subject to Subchapter E of Chapter 10, relating to Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers. Additionally, the section states that sanctions provided by this subchapter are in addition to other actions and remedies available to the department. The latter provision gives notice that the department is not forfeiting any options legally available to it.

New §10.252, Procedure, details the method by which sanctions will be imposed. The executive director may impose a sanction on an entity if a ground for a sanction exists. If the executive director decides to impose a sanction, it will be imposed in accordance with Figure: 43 TAC §10.255(c). These provisions limit the executive director's discretion on when and how to impose a sanction and give notice to entities of these limits. The section also states that a sanction is effective on the date specified in the notice, unless it is stayed pending an appeal. The section specifies that the imposition of a sanction on an entity does not affect the entity's obligations under an agreement with the department or limit the department's remedies under the agreement. This provision preserves the integrity of contractual agreements with the department. Finally, this section states that the executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend an entity without a prior hearing. This protects department resources from being irresponsibly allocated before a sanction is finally imposed. In order to ensure that a suspension is not unnecessarily imposed, the executive director will consider all relevant circumstances before imposing a suspension, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct.

New §10.253, Notice of Sanction, describes the contents of the notice that will be sent to an entity receiving a sanction. In order to ensure timely notification, the department will notify the entity by certified mail within five working days after the date of the executive director's decision to issue a sanction. The notice will state the sanction and the period of the sanction, summarize the facts and circumstances underlying the sanction, explain how the sanction was selected, inform the entity of the imposition of a suspension if applicable, and state that the entity may appeal the sanction. To encourage transparency, it is the department's intent for a sanctioned entity to have full knowledge of the basis of the sanction and how the sanction was decided.

New §10.254, Available Sanctions, describes the sanctions available to the department and also identifies factors that will be considered in imposing the sanction. Available sanctions, in order of increasing severity, are a reprimand, prohibition from participating in a specified agreement, a limit on the contract amount or amount of funds that may be awarded or paid to the entity, or debarment of the entity for a period of not more than 60 months. The range of sanctions available allows the department to appropriately address various levels of violations. Factors that will be considered in imposing the sanction include the seriousness and willfulness of the act or omission, whether and when the entity has committed similar acts or omissions, whether the department has been fully compensated for any damages, and mitigating factors, including the entity's adoption and enforcement of an internal ethics and compliance program, the entity's cooperation with the department in the investigation of ethical violations, and the entity's disassociation from individuals and firms that have been involved in the ethical violation. The department's consideration of a range of factors guarantees that all aspects of a particular situation can be evaluated in assigning a sanction to a violation.

New §10.255, Application of Sanction, sets forth guidelines for application of a sanction by assigning, for specific violations, the sanctions available to the executive director and taking into consideration the factors described in §10.254(b). The guidelines

are set forth in a chart format that ties specific sanctions to specific violations based on varying factors. The chart is designed to show the most severe sanction allowable for a specific violation. The executive director may assign a lesser sanction than recommended for a specific violation, but may not assign a more severe sanction than recommended. Additionally, if an entity commits multiple violations arising out of separate occurrences, the executive director may impose multiple sanctions. The process provides notice as to an entity's recommended sanction while also granting limited discretion to the department.

New §10.256, Appeal of Sanction, describes the procedure for appeal of a sanction other than a reprimand. A sanction may be appealed to the executive director for an informal hearing. This option allows the entity the opportunity to appeal a sanction in an informal setting that requires minimal time and resource investment. If the entity is unsatisfied with the decision of the executive director, the entity may pursue a contested case hearing in the State Office of Administrative Hearings (SOAH). This option offers the entity a judicial proceeding through which it may present evidence and offer testimony in support of its appeal. Following the contested case hearing, the administrative law judge's proposal for decision is presented to the commission at a regularly scheduled open meeting for a determination based on the proposal for decision. The commission may consider oral presentations. The commission's determination on the proposal for decision will be adopted by minute order. The executive director will issue a final order on the sanction based on the commission's determination, or if an appeal to SOAH is not requested, the determination of the informal hearing. This multi-step process for appeal ensures due process in the application of a sanction and allows an entity the opportunity to appeal a sanction.

Section 10.256(e) specifies that a reprimand may be appealed by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand. The executive director will make the determination on an appeal and issue a final order. Because a reprimand is the least severe sanction and has minimal implications on an entity, a more limited opportunity to appeal is appropriate.

Section 10.256(f) states that a sanction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed. Staying a sanction during the pendency of an appeal makes certain that a sanction is not unjustly imposed in a situation in which an appeal results in a reversal of a sanction. The automatic stay provided by subsection (f) does not apply to a suspension or a reprimand. An order of the executive director under §10.256 is not subject to judicial review unless otherwise provided by law.

New §10.257, Lessening or Removal of Sanction, provides that an entity may request that the executive director reduce or remove a sanction once in a 12-month period. This provision ensures that the executive director will have the ability to lessen or remove a sanction if the circumstances underlying the sanction change and is intended to motivate entities to improve the issues that originally led to the sanction in the effort to have the sanction reduced or removed.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new chapter as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new chapter.

Steve Simmons, Deputy Executive Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new chapter.

PUBLIC BENEFIT AND COST

Mr. Simmons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new chapter will be to increase the integrity of department agreements by ensuring contractors adhere to ethical standards of conduct. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on September 22, 2010, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed new Chapter 10 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. October 12, 2010.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§10.1 - 10.7

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.1. Purpose.

(a) As a steward of public resources, the department must ensure the protection of public funds and maintain a high level of transparency and accountability. Therefore, the department expects entities doing business with the department to adhere to ethical standards of conduct. This chapter prescribes required ethical standards for entities doing business with the department, and most enforcement provisions applicable for violations of the ethical standards.

(b) The ethical requirements and enforcement provisions provided under this chapter do not apply to the federal government or an agency of the federal government.

(c) Enforcement provisions for ethical violations by a contractor who is subject to Chapter 9, Subchapter G of this title (relating to Highway Improvement Contract Sanctions) are provided under that chapter rather than under this chapter.

(d) The requirements and enforcement provisions provided under this chapter are in addition to any other contract, rule, or legal requirement or enforcement provision.

§10.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Assistant executive director--An assistant executive director of the Texas Department of Transportation.

(2) Commission--The Texas Transportation Commission.

(3) Debarment--Disqualification of an entity from bidding on or entering into a contract with the department, from participating as a subcontractor under a contract with the department, and from participating as a supplier of materials or equipment to be used under a contract with the department.

(4) Department--The Texas Department of Transportation.

(5) Entity--A contractor, subcontractor, supplier, grantee, subgrantee, provider, subprovider, governmental agency, local government, or other business or governmental organization with which the department does business. The term does not include the federal government or an agency of the federal government.

(6) Executive director--The executive director of the Texas Department of Transportation.

(7) Reprimand--A written warning issued by the department that documents an act or omission committed by an entity.

(8) Sanction--A consequence imposed on an entity for failure to comply with this chapter including suspension, reprimand, prohibition against participation in a specified agreement, or debarment.

(9) Suspension--Immediate, temporary disqualification of an entity or individual from entering into or attempting to enter into an agreement with the department.

§10.3. Delivery of Written Notice, Disclosures, or Requests to the Department.

For the purposes of this chapter, written notice, disclosures, or requests may be delivered to the department by:

(1) sending the document by United States mail or by overnight delivery service to: Executive Director, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; or

(2) hand delivering the document to: Executive Director, Texas Department of Transportation, 125 East 11th Street, Austin, Texas.

§10.4. Act of Individual Imputed to Entity.

For the purposes of this chapter, an act of or omission by a person on behalf of an entity that seriously and directly affects the entity's responsibility to the department is considered to be an act or omission of the entity.

§10.5. Benefit.

(a) Except as provided by subsection (b) of this section, a benefit, for the purposes of this chapter, is anything that is reasonably regarded as financial gain or financial advantage, including a benefit to another person in whose welfare the beneficiary has a direct and substantial interest, regardless of whether the donor is reimbursed. Examples are cash, loans, meals other than ordinary working meals, lodging, services, tickets, door prizes, free entry to entertainment or sporting events, transportation, hunting or fishing trips, or discounts on goods or services.

(b) The following are not benefits for the purposes of this chapter:

(1) an ordinary working meal;

(2) a token item, other than cash, a check, stock, bond, or similar item, that is distributed generally as a normal means of advertising and that does not exceed an estimated value of $25;

(3) an honorarium in the form of a meal served at an official, department-related event such as a conference, workshop, seminar, or symposium; or

(4) reimbursement for food, travel, or lodging to an event described by paragraph (3) of this subsection in an amount allowable under department policy if the recipient were to seek reimbursement from the department, or a greater amount if preapproved by the assistant executive director.

§10.6. Conflict of Interest.

For the purposes of this chapter, a conflict of interest is a circumstance arising out of existing or past activities, business interests, contractual relationships, or organizational structure of an entity, or a familial or domestic living relationship between a department employee and an employee of the entity, and because of which:

(1) the entity's objectivity in performing the scope of work sought by the department is or might be affected; or

(2) the entity's performance of services on behalf of the department or participation in an agreement with the department provides or may reasonably appear to provide an unfair competitive advantage to the entity or to a third party.

§10.7. Delegation of Authority.

(a) The executive director may delegate to the assistant executive director any authority provided to the executive director under this chapter, unless otherwise provided.

(b) The assistant executive director may delegate to an employee of the department who is not below the level of district engineer, division director, or office director any authority provided to the

assistant executive director under this chapter, including authority delegated under subsection (a) of this section, unless otherwise provided.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005052
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

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SUBCHAPTER B. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE PROCEDURES

43 TAC §10.51

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.51. Internal Ethics and Compliance Program.

(a) Various sections of this title require an entity to adopt and enforce an internal ethics and compliance program. To comply with that requirement, the entity must certify to the department that the entity:

(1) has adopted an internal ethics and compliance program that:

(A) is designed to detect and prevent violations of the law, including regulations, and ethical standards applicable to the entity or its officers or employees; and

(B) satisfies all requirements of this section; and

(2) enforces compliance with its internal ethics and compliance program.

(b) An entity's internal ethics and compliance program must be in writing and must provide compliance standards and procedures that the entity's employees and agents are expected to follow. At a minimum, the program must provide that:

(1) high-level personnel are responsible for oversight of compliance with the standards and procedures;

(2) appropriate care is being taken to avoid the delegation of substantial discretionary authority to individuals whom the organization knows, or should know, have a propensity to engage in illegal activities;

(3) compliance standards and procedures are effectively communicated to all of the organization's employees by requiring them to participate in training and disseminating to them information that explains, in understandable language, the requirements of the program;

(4) the governing body or individuals of the organization have periodic training in ethics and in the compliance program;

(5) compliance standards and procedures are effectively communicated to all of the organization's agents;

(6) reasonable steps are being taken to achieve compliance with the compliance standards and procedures by:

(A) using monitoring and auditing systems that are designed to reasonably detect noncompliance; and

(B) providing and publicizing a system for the organization's employees and agents to report suspected noncompliance without fear of retaliation;

(7) consistent enforcement of compliance standards and procedures is administered through appropriate disciplinary mechanisms;

(8) reasonable steps are being taken to respond appropriately to detected offenses and to prevent future similar offenses; and

(9) the organization has a written employee code of conduct that, at a minimum, addresses:

(A) record retention;

(B) fraud;

(C) equal opportunity employment;

(D) sexual harassment and sexual misconduct;

(E) conflicts of interest;

(F) personal use of the organization's property; and

(G) gifts and honoraria.

(c) The department may, at its discretion, request that the entity provide the department with written evidence of the entity's internal ethics and compliance program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER C. REQUIRED CONDUCT BY ENTITIES DOING BUSINESS WITH THE DEPARTMENT

43 TAC §10.101, §10.102

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.101. Required Conduct.

An entity that does business with the department is required to:

(1) disclose to the department in writing the existence of a conflict of interest involving an agreement between the entity and the department and adequately remedy the conflict:

(A) before the effective date of the agreement; or

(B) if the conflict of interest arises after the effective date of the agreement, within five working days after the date that the entity knows or should have known of the conflict;

(2) refrain from offering, giving, or agreeing to give a benefit to a member of the commission or to a department employee;

(3) adhere to all civil and criminal laws related to business;

(4) maintain good standing with the comptroller, other state agencies, states, and agencies of the federal government with which the entity has had a business relationship;

(5) notify the department in writing within five working days after the date that the entity knows or should have known of the existence of, and must adequately address:

(A) a conviction of, a plea of guilty or nolo contendere to, a civil judgment for or a public admission to a crime or offense related to business by the entity;

(B) debarment of the entity by the comptroller, another state agency, another state, or an agency of the federal government for a ground related to business integrity; or

(C) any behavior of the entity that seriously and directly affects the entity's responsibility to the department and that is also a violation of:

(i) the law;

(ii) the department's rules that relate to the entity's dealing with the department; or

(iii) the entity's internal ethics and compliance procedures.

§10.102. Grounds for Sanctions.

An entity's violation of §10.101 of this subchapter (relating to Required Conduct) is a ground for the imposition of sanctions, score reduction, or removal from precertification status under this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
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Texas Department of Transportation
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SUBCHAPTER D. SCORE REDUCTION FOR ETHICAL VIOLATIONS BY ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICE PROVIDERS

43 TAC §§10.151 - 10.160

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.151. Definitions.

The following words, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Provider--An individual or entity that provides engineering, architectural, or surveying services.

(2) Team--The provider and all proposed subproviders who will be working on a particular contract.

§10.152. Score Reduction for Ethical Violations.

(a) If a provider violates §10.101 of this chapter (relating to Required Conduct), the executive director may reduce the provider's points total under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services, in accordance with this subchapter.

(b) An action taken under this subchapter is in addition to other actions and remedies available to the department.

§10.153. Member Score Reduction Applied to Team.

If any member of a team receives or has received a score reduction under this subchapter, then the score reduction will be applied to all submissions of the team under 43 TAC Chapter 9, Subchapter C, relating to Contracting for Architectural, Engineering and Surveying Services.

§10.154. Factors Considered in Imposing Score Reduction.

(a) Before imposing a score reduction, the executive director will consider the following factors:

(1) the seriousness and willfulness of the act or omission;

(2) whether the provider has committed similar acts or omissions and, if so, when those acts or omissions were committed;

(3) whether the provider, or a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions; and

(4) any mitigating factors.

(b) For the purposes of subsection (a)(4) of this section, mitigating factors are:

(1) the provider's adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of §10.51 of this chapter (relating to Internal Ethics and Compliance Program);

(2) the provider's cooperation with the department in the investigation of ethical violations, including the provision of a full and complete account of the provider's involvement; and

(3) the provider's disassociation from individuals and firms that have been involved in the ethical violation.

§10.155. Amount and Period of Score Reduction.

(a) The executive director, at the executive director's sole discretion, may assign a score reduction that is less than, but not greater than, the recommended score reduction under subsection (b) of this section.

(b) Figure: 43 TAC §10.155(b) sets forth guidelines for application of a score reduction by assigning for the specific violations of §10.101 of this chapter (relating to Required Conduct), the percentage of score reduction available, and the maximum period for which that percentage of score reduction may be applied, taking into consideration the factors described in §10.154 of this subchapter (relating to Factors Considered in Imposing Score Reduction).
Figure: 43 TAC §10.155(b)

§10.156. Notice of Score Reduction.

(a) If the executive director imposes a score reduction under this section, the department will notify the provider by certified mail within five working days after the date of the executive director's decision. The notice will:

(1) state the percentage of score reduction and the period during which the reduction will be imposed;

(2) summarize the facts and circumstances underlying the reduction;

(3) explain how the percentage of score reduction and the time period of the score reduction were determined using Figure: 43 TAC §10.155(b) as a basis for explanation;

(4) if applicable, inform the provider of the imposition of a suspension under subsection (b) of this section; and

(5) state that the provider may appeal the reduction in accordance with §10.158 of this subchapter (relating to Appeal of Score Reduction).

(b) The executive director, concurrent with the delivery of the notice of a score reduction, may suspend a provider. Before imposing a suspension, the executive director will consider all relevant circumstances, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order is entered under §10.158(d) of this subchapter.

(c) The imposition of a score reduction or a suspension on a provider does not affect the provider's obligations under an agreement with the department or limit the department's remedies under the agreement.

§10.157. Application of Score Reduction.

(a) The score reduction will be applied to each letter of interest submittal of the provider under 43 TAC Chapter 9, Subchapter C, Contracting for Architectural, Engineering, and Surveying Services.

(b) The score reduction will be applied at the earliest of the following steps in the selection process:

(1) on assignment of the score at the long list evaluation (§9.34 of this title, relating to Short List Determination);

(2) on assignment of the score at the short list proposal evaluation (§9.35 of this title, relating to Short List Meeting, Proposals, and Evaluation);

(3) on assignment of the score at the interview evaluation (§9.36 of this title, relating to Short List Interviews and Evaluation); or

(4) on preparation of a contract evaluation summary (§9.37 of this title, relating to Selection).

§10.158. Appeal of Score Reduction.

(a) A provider may appeal a score reduction by delivering to the executive director a written notice of appeal within 10 working days after the date that the department mails the notice of the score reduction under §10.156 of this subchapter (relating to Notice of Score Reduction).

(b) If the notice of appeal is timely delivered, the provider will be given the opportunity for an informal hearing before the executive director. The executive director will set a time for the hearing at the executive director's earliest convenience. The executive director will set the maximum time allowed for oral presentations and the procedure for written documents to be presented by the provider. The executive director will notify the provider in writing within 5 working days of the executive director's determination on the appeal.

(c) If the provider is dissatisfied with the determination of the executive director, the provider may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Case). To be effective the request must be received by the executive director within 10 working days after the date that the executive director mails the notification of determination under subsection (b) of this section.

(d) The proposal for decision will be presented to the commission at a regularly scheduled open meeting. The commission may consider oral presentations. The commission will make a determination based on the proposal for decision. The commission's determination on the proposal for decision will be adopted by minute order and reflected in the minutes of the meeting.

(e) If an appeal to the executive director or by an administrative hearing, as appropriate, is not timely requested under this section, the executive director will issue a final order imposing the score reduction when the deadline for requesting an appeal has passed. If an appeal is timely requested, the executive director will issue a final order based on one of the following:

(1) the executive director's determination under subsection (b) of this section; or

(2) the commission's determination under subsection (d) of this section.

(f) A score reduction is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the score reduction, the full term of the score reduction will be imposed on the date of the final order unless the executive director expressly orders that a lesser score reduction be imposed.

(g) The order of the executive director issued under subsection (f) of this section is final and not subject to judicial review, except as required by law.

§10.159. Lessening or Removal of Score Reduction.

(a) A provider may request the lessening or removal of an imposed score reduction by delivering to the executive director the request in writing and written documentation in support of the request demonstrating changes in the circumstances that were described in the notice of score reduction under §10.156 of this subchapter (relating to Notice of Score Reduction).

(b) The executive director, at the executive director's sole discretion, may decide to lessen or remove the imposed score reduction. The executive director will send a written notice of the decision to the provider.

(c) The executive director will consider not more than one request for an entity under this section during any 12-month period.

§10.160. Publication of Names of Providers Receiving Score Reductions.

(a) The department will provide on its website a list of the names of the providers who are subject to score reductions under this subchapter.

(b) The name of a provider will be added to the list when the score reduction becomes effective and will be removed from the list as soon as practicable after the date on which the application of the score reduction ends.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER E. REMOVAL OF PRECERTIFICATION OF ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICE PROVIDERS FOR ETHICAL VIOLATIONS

43 TAC §§10.201 - 10.206

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.201. Purpose.

A person who is precertified under §9.43 of this title (relating to Precertification Requirements) may have the person's precertification removed by the assistant executive director if a ground for removal of precertification under §10.101 of this chapter (relating to Required Conduct) exists.

§10.202. Factors Considered in Removing Precertification.

(a) Before removing a person's precertification, the assistant executive director will consider the following factors:

(1) the seriousness and willfulness of the act or omission;

(2) whether and when the person has committed similar acts or omissions;

(3) whether the person, or a third party on behalf of the person, has fully compensated the department for any damages suffered by the department as a result of the person's acts or omissions; and

(4) any mitigating factors.

(b) For the purposes of subsection (a)(4) of this section, the following are mitigating factors:

(1) the person's cooperation with the department in the investigation of ethical violations, including the provision of a full and complete account of the person's involvement; or

(2) the person's disassociation from individuals and firms that have been involved in the ethical violation.

§10.203. Time Period of Prohibition from Reapplying for Precertification.

(a) If a person's precertification is removed under this subchapter, the period during which the person is prohibited from reapplying for precertification is set by the assistant executive director based on the guidelines in subsection (c) of this section.

(b) The assistant executive director, at the assistant executive director's sole discretion, may prohibit a person from applying for precertification for less time than, but not more time than, the recommended time period under subsection (c) of this section.

(c) Figure: 43 TAC §10.203(c) sets forth guidelines for assigning the time period during which a person is prohibited from reapplying for precertification based on specific violations of §10.101 of this chapter (relating to Required Conduct), taking into consideration the factors described in §10.202 of this subchapter (relating to Factors Considered in Removing Precertification).
Figure: 43 TAC §10.203(c)

§10.204. Notice of Removal of Precertification.

(a) If the assistant executive director removes a person's precertification, the department will notify the person by certified mail within five working days after the date of the assistant executive director's decision. The notice will:

(1) state the period for which precertification is prohibited;

(2) summarize the facts and circumstances underlying the removal of precertification;

(3) explain how the period of the prohibition was selected, using §10.203 of this subchapter (relating to Time Period of Prohibition from Reapplying for Precertification) as a basis for explanation; and

(4) state that the person may appeal the removal of precertification under §10.205 of this subchapter (relating to Appeal of Removal of Precertification).

(b) The assistant executive director, concurrent with the delivery of the notice of removal from precertification status, may suspend a person from participating in agreements with the department. Before imposing a suspension, the assistant executive director will consider all relevant circumstances, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when the deadline for appeal under §10.205(a) of this subchapter has passed and the provider has not appealed the removal from precertification status, or if the provider has appealed, when a final order is entered under §10.205(c) of this subchapter.

(c) The removal of a person's precertification or a suspension of a person does not affect the person's obligations under an agreement with the department or limit the department's remedies under the agreement.

(d) Unless the assistant executive director imposes a suspension under subsection (b) of this section, the removal of a person's precertification status does not prevent that person from participating in agreements with the department in a capacity that does not require precertification status.

§10.205. Appeal of Removal of Precertification.

(a) A person may appeal the removal of precertification by delivering to the executive director a written notice of appeal within 10 working days after the date that the department mails the notice of removal of precertification under §10.204 of this subchapter (relating to Notice of Removal of Precertification).

(b) The person may submit with the notice of appeal written documentation in support of the appeal. The person may alternatively request an in-person meeting with the executive director for the purpose of presenting written documentation and oral presentation in support of the appeal and answering questions posed by the executive director. The meeting will be scheduled at the executive director's earliest convenience.

(c) The executive director will consider any written documentation submitted by a person and any oral presentation made in support of an appeal. The executive director will make a decision on the person's appeal and issue a final order. The decision of the executive director is final and not subject to judicial review, except as required by law.

(d) The executive director may not delegate authority under this section.

§10.206. Eligibility to Reapply for Precertification.

(a) A person whose precertification has been removed under this subchapter may not reapply for precertification until after the period of prohibition for precertification ends.

(b) A person may request the reduction or removal of a period of prohibition for precertification by delivering to the assistant executive director the request in writing and written documentation in support of the request demonstrating changes in the circumstances that were described in the notice of score reduction under §10.204 of this subchapter (relating to Notice of Removal of Precertification).

(c) The assistant executive director, at the assistant executive director's sole discretion, may decide to reduce or remove the period of prohibition for precertification. The assistant executive director will send a written notice of the decision to the provider.

(d) The assistant executive director will consider not more than one request for an entity under this section during any 12-month period.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
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SUBCHAPTER F. SANCTIONS FOR ETHICAL VIOLATIONS BY OTHER ENTITIES

43 TAC §§10.251 - 10.257

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.251. Application of Subchapter.

(a) This subchapter applies only to an individual or entity doing business with the department that is subject to this chapter but not subject to Subchapter D, Score Reduction for Ethical Violations by Architectural, Engineering, and Surveying Service Providers, of this chapter.

(b) The sanctions provided by this subchapter are in addition to other actions and remedies available to the department.

§10.252. Procedure.

(a) The executive director may impose a sanction on an entity if a ground for a sanction under §10.101 of this chapter (relating to Required Conduct) exists. The executive director will impose sanctions under this subchapter in accordance with §10.255(c) of this subchapter (relating to Application of Sanction).

(b) Except as provided in §10.256(g) of this subchapter (relating to Appeal of Sanction), a sanction is effective on the date specified in the notice of sanction under §10.253 of this subchapter (relating to Notice of Sanction).

(c) The imposition of a sanction on an entity does not affect the entity's obligations under an agreement with the department or limit the department's remedies under the agreement.

(d) The executive director, concurrent with the delivery of the notice of a sanction other than a reprimand, may suspend an entity without a prior hearing. Before imposing a suspension, the executive director will consider all relevant circumstances, including the severity and willfulness of the conduct, the likelihood of immediate harm to the public, and whether there has been a pattern of inappropriate conduct. The suspension terminates when a final order is entered under §10.256(e) of this subchapter.

§10.253. Notice of Sanction.

If the executive director imposes a sanction under this subchapter, the department will notify the entity by certified mail within five working days after the date of the executive director's decision. The notice will:

(1) state the sanction and the time period of the sanction, if applicable;

(2) summarize the facts and circumstances underlying the sanction;

(3) explain how the sanction was selected, using §10.255(c) of this subchapter (relating to Application of Sanction) as a basis for explanation;

(4) if applicable, inform the entity of the imposition of a suspension under §10.252(d) of this subchapter (relating to Procedure); and

(5) state that the provider may appeal the reduction in accordance with §10.256 of this subchapter (relating to Appeal of Sanction).

§10.254. Available Sanctions.

(a) The available sanctions, in order of increasing severity, are:

(1) a reprimand;

(2) prohibition from participating in a specified agreement, whether the agreement was previously awarded or to be awarded or whether funds under the agreement have been paid or are to be paid;

(3) a limit on the contract amount or amount of funds that may be awarded or paid to the entity for a period of not more than 60 months; or

(4) debarment of the entity for a period of not more than 60 months.

(b) Before imposing a sanction, the executive director will consider the following factors:

(1) the seriousness and willfulness of the act or omission;

(2) whether the entity has committed similar acts or omissions and if so, when those acts or omissions were committed;

(3) whether the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions; and

(4) any mitigating factors.

(c) For the purposes of subsection (b)(4) of this section, the following are mitigating factors:

(1) the entity's adoption and enforcement of an internal ethics and compliance program that satisfies the requirements of §10.51 of this chapter (relating to Internal Ethics and Compliance Program);

(2) the entity's cooperation with the department in the investigation of ethical violations, including the provision of a full and complete account of the entity's involvement; or

(3) the entity's disassociation from individuals and firms that have been involved in the ethical violation.

§10.255. Application of Sanction.

(a) The executive director, at the executive director's sole discretion, may impose a sanction that is less severe, but not more severe, than the sanction recommended under §10.254(c) of this subchapter (relating to Available Sanctions).

(b) If an entity commits multiple violations arising out of separate occurrences, the executive director may impose multiple sanctions in accordance with subsection (c) of this section.

(c) Figure: 43 TAC §10.255(c) sets forth guidelines for application of a sanction by assigning for specific violations of §10.101 of this chapter (relating to Required Conduct), the sanctions available to the executive director as described in §10.254(a) of this subchapter, taking into consideration the factors described in subsection §10.254(b) of this subchapter.

Figure: 43 TAC §10.255(c)

§10.256. Appeal of Sanction.

(a) A sanction, other than a reprimand, and unless ordered or directed by the federal government, may be appealed to the executive director by delivering to the executive director a written notice of appeal within 10 working days after the effective date of the sanction as specified in the notice of sanction. If the notice of appeal is timely delivered, the entity will be given the opportunity for an informal hearing before the executive director. The executive director will set a time for the hearing at the executive director's earliest convenience. The executive director will set time the maximum allowed for oral presentations and the procedure for written documents to be presented by the entity. The executive director will notify the entity in writing within 5 working days of the executive director's determination on the appeal.

(b) If the entity is dissatisfied with the determination of the executive director, the entity may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Cases). To be effective the request must be received by the executive director within 10 working days after the date that the executive director mails the notification of determination under subsection (b) of this section.

(c) The proposal for decision will be presented to the commission at a regularly scheduled open meeting. The commission may consider oral presentations. The commission will make a determination based on the proposal for decision. The commission's determination on the proposal for decision will be adopted by minute order and reflected in the minutes of the meeting.

(d) If an appeal to the executive director or by an administrative hearing, as appropriate, is not timely requested under this section, the executive director will issue a final order imposing the sanction when the deadline for requesting an appeal has passed. If an appeal is timely requested, the executive director will issue a final order based on one of the following:

(1) the executive director's determination under subsection (a) of this section; or

(2) the commission's determination under subsection (c).

(e) If the only sanction being imposed is a reprimand, the entity may appeal the reprimand by delivering to the executive director a written notice of appeal and written documentation disputing the reprimand within 10 working days after the effective date of the sanction as specified in the notice of sanction. The executive director will make the determination on an appeal and issue a final order under this subsection.

(f) A sanction, other than a suspension or a reprimand, is automatically stayed from the date that the department receives the notice of appeal until a final order is entered by the executive director. On entry of a final order by the executive director imposing the sanction, the full term of the sanction will be imposed on the date of the final order unless the executive director expressly orders that a lesser sanction be imposed.

(g) The order of the executive director issued under subsection (e) of this section is final and not subject to judicial review, except as required by law.

§10.257. Lessening or Removal of Sanction.

(a) An entity may request the reduction or removal of a sanction imposed under this subchapter by delivering to the executive director the request in writing and written documentation in support of the request demonstrating changes in the circumstances that were described in the notice of score reduction under §10.253 of this subchapter (relating to Notice of Sanction).

(b) The executive director, at the executive director's sole discretion, may decide to reduce or remove the sanction. The executive director will send a written notice of the decision to the entity.

(c) The executive director will consider not more than one request under this section during any 12-month period.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
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Texas Department of Transportation
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CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

SUBCHAPTER H. TRANSPORTATION CORPORATIONS

43 TAC §15.92

The Texas Department of Transportation (department) proposes amendments to §15.92, Miscellaneous Powers and Duties of Corporations.

EXPLANATION OF PROPOSED AMENDMENTS

43 TAC §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009 establishes, for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program, the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §15.92(c) merely changes the reference from §1.8 to the new §10.51 to reflect that change.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be accuracy in internal citations within the commission's rules. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §15.92 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§15.92. Miscellaneous Powers and Duties of Corporations.

(a) - (b) (No change.)

(c) Internal ethics and compliance program. A corporation shall adopt an internal compliance and ethics program that satisfies the requirements of §10.51 [~~§1.8~~] of this title (relating to Internal Ethics and Compliance Program) before the later of:

(1) January 1, 2010; or

(2) the first anniversary of the date on which the corporation is created.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 26. REGIONAL MOBILITY AUTHORITIES

SUBCHAPTER F. MISCELLANEOUS OPERATION PROVISIONS

43 TAC §26.56

The Texas Department of Transportation (department) proposes amendments to §26.56, Required Internal Ethics and Compliance Program.

EXPLANATION OF PROPOSED AMENDMENTS

43 TAC §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009 establishes, for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program, the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §26.56(a) merely changes the reference from §1.8 to the new §10.51 to reflect that change.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be accuracy in internal citations within the commission's rules. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §26.56 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§26.56. Required Internal Ethics and Compliance Program.

(a) An RMA shall adopt an internal compliance and ethics program that satisfies the requirements of §10.51 [~~§1.8~~] of this title (relating to Internal Ethics and Compliance Program).

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER E. FINANCIAL ASSISTANCE FOR TOLL FACILITIES

43 TAC §27.53

The Texas Department of Transportation (department) proposes amendments to §27.53, Request.

EXPLANATION OF PROPOSED AMENDMENTS

43 TAC §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009 establishes, for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program, the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §27.53(a)(3) merely changes the reference from §1.8 to the new §10.51 to reflect that change.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be accuracy in internal citations within the commission's rules. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §27.53 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§27.53. Request.

(a) Eligibility.

(1) A public or private entity that is authorized by state law to construct or maintain a toll facility is eligible to submit a request for financing under this subchapter.

(2) A private entity is not eligible to submit a request for a grant.

(3) For requests submitted after January 1, 2010, to be eligible to receive funds under this subchapter, an entity must have adopted an internal ethics and compliance program that satisfies the requirements of §10.51 [~~§1.8~~] of this title (relating to Internal Ethics and Compliance Program) and must enforce compliance with that program.

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 31. PUBLIC TRANSPORTATION
SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §31.39

The Texas Department of Transportation (department) proposes amendments to §31.39, Required Internal Ethics and Compliance Program.

EXPLANATION OF PROPOSED AMENDMENTS

Title 43 Texas Administrative Code (43 TAC), §1.8, Internal Ethics and Compliance Program, which became effective February 19, 2009 establishes, for an entity that is required by Texas Transportation Commission (commission) rule to have an internal ethics and compliance program, the minimum requirements of such a program and requires the entity to certify that it has adopted and enforces compliance with the program.

In separate rules adopted by the commission concurrently with this rule, §1.8 is repealed and the substance of that rule is transferred to new §10.51. The amendment to §31.39 merely changes the reference from §1.8 to the new §10.51 to reflect that change.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be accuracy in internal citations within the commission's rules. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §31.39 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§31.39. Required Internal Ethics and Compliance Program.

To be eligible to receive state or federal public transportation funds awarded by the commission after January 1, 2011, an entity must have adopted an internal ethics and compliance program that satisfies the requirements of §10.51 [~~§1.8~~] of this title (relating to Internal Ethics and Compliance Program) and must enforce compliance with that program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005061
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

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PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 215. MOTOR VEHICLE DISTRIBUTION
SUBCHAPTER H. ADVERTISING

43 TAC §215.271

The Texas Department of Motor Vehicles proposes new §215.271, Auction, relating to advertising by motor vehicle dealers, manufacturers, distributors, converters, lessors, lease facilitators, representatives, and in-transit licensees.

EXPLANATION OF PROPOSED NEW SECTION

House Bill 3097, 81st Legislature, Regular Session, 2009 created a new state agency, the Texas Department of Motor Vehicles (department), from the motor carrier, motor vehicle, vehicle titles and registration, and automobile burglary and theft prevention authority divisions of the Texas Department of Transportation. The department adopted rules on January 14, 2010 incorporating the content previously contained in 43 TAC Chapter 8 to create new 43 TAC Chapter 215. At the time of the adoption of 43 TAC Chapter 215, Motor Vehicle Distribution, a provision contained in 43 TAC §8.256 relating to the use of "auction," "auction special," and similar wording was inadvertently omitted from the provisions related to advertising. New §215.271 adds the omitted language. The proposed new language states that the use of "auction," "auction special," and similar wording may only be used in advertising in connection with a vehicle that is offered or sold at a bona fide auction.

Transportation Code, §1002.002 authorizes the adoption of rules restricting advertising. Moreover, Occupations Code, §2301.152 requires the board to prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles.

The business of buying, selling, and exchanging motor vehicles is of vital importance to the economy of the state of Texas and it is essential that the public have confidence in the oversight and regulation of the motor vehicle industry. The department con-

siders it important that the use of "auction," "auction special," and similar wording be restricted to a context related to a bona fide auction. Usage outside this context creates opportunities for profiting from fraudulent or deceptive practices in motor vehicle transactions. These acts can cause serious financial harm to individuals who may be victims of deceptive, fraudulent, and illegal acts by persons in the business of selling motor vehicles.

FISCAL NOTE

Linda Flores, Chief Financial Officer, has determined that for each year of the first five years the new section as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section.

PUBLIC BENEFIT AND COST

Carol Kent, Interim Director of the Enforcement Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT AND COST

Ms. Kent has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the new section will be the continuation of industry practices that have reduced consumer complaints relating to false, misleading, and deceptive advertising practices in the vehicle distribution industry. The reputation and sales practices of the industry may improve and the public's confidence in dealers and other licensees may rise.

There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new §215.271, may be submitted to Carol Kent, Texas Department of Motor Vehicles, Enforcement Division, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §1002.001 and Occupations Code, §2301.155, which provide the Board of the Texas Department of Motor Vehicles (Board) with the authority to establish rules as necessary and appropriate to implement the powers and duties of the department, and more specifically, Transportation Code §1002.002, which authorizes the Board to adopt rules regulating motor vehicle advertising.

CROSS REFERENCE TO STATUTE

Transportation Code, §1002.002, and Occupations Code, §2301.203.

§215.271. Auction.

Terms such as "auction" or "auction special" and other terms of similar import shall be used only in connection with a vehicle offered or sold at a bona fide auction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005007
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

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CHAPTER 217. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.22, §217.40

The Texas Department of Motor Vehicles (department) proposes amendments to §217.22, Motor Vehicle Registration, and §217.40, Marketing of Specialty License Plates through a Private Vendor, all concerning motor vehicle registration.

EXPLANATION OF PROPOSED AMENDMENTS

These amendments are necessary to continue the implementation of Transportation Code, Chapter 504, as amended by Senate Bill 1616, 81st Legislature, Regular Session, 2009, concerning the development of new specialty license plates, including the marketing of specialty license plates through a private vendor. These amendments allow registration renewal notices to be sent via electronic mail, delay the price increase for the generic white and T plates until December 2, 2010, which coincides with the next computer implementation date, and clarify that specialty plates issued under Transportation Code, Chapter 504, Subchapters G and I, are grandfathered at the issuance price if the sponsor of a specialty license plate signs a contract with the vendor under Transportation Code, Chapter 504, Subchapter J. The amendments provide that trailer plates may be issued for seven years without the windshield sticker if the registration receipt is retained on or inside the vehicle.

The amendments to §217.22(c) and (d) create "permanent" trailer plates which allow a trailer to retain the same plate for seven years without being issued a windshield sticker. The registration receipt retained inside or on the vehicle will provide evidence of registration. Other amendments to §217.22(d) allow the department to send renewal notices by electronic mail if the customer chooses that option. Once such an electronic system is implemented, receiving renewal notices by mail is still an option. Other changes update the rules to include that the registration renewal may be accomplished by the customer through the Internet, not just through the county's Internet capability.

Amendments to §217.40(h)(1) and (2) delay the increase in fees for one year "T" plates and generic plates. The increase in fees was approved by the Texas Motor Vehicles Board on July 10, 2010, but is being delayed due to computer implementation timetables. Amendments to §217.40(h)(8) grandfather existing specialty license plate fees, including personalization, issued under Transportation Code, Chapter 504, Subchapters G and I, at the issuance price if the sponsor of a specialty license plate signs a contract with the vendor under Transportation Code, Chapter 504, Subchapter J and the plates are timely renewed.

Amendments to §217.40(l)(2) clarify that the transfer of patterns that have been purchased at auction may be by gift, inheritance,

or sale. Such a transfer does not need to be through another auction.

FISCAL NOTE

Linda Flores, Interim Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state and local governments as a result of enforcing or administering the sections. There may be some positive fiscal implications to the state when it implements the sending of registration renewal notices by electronic mail, depending upon the number of customers who choose to receive electronic mail. This amount cannot be determined because the amount of postage saved is dependent on the number of electronic email notices sent. The permanent trailer plate may also increase revenue as companies who have been registering their trailers in other jurisdictions may return their registration to Texas. This amount cannot be determined as there is not a way to track the amount of Texas trailers that have left Texas jurisdiction for registration elsewhere. An increase in registration would be positive for local and state governments.

Mike Craig, Director, Vehicles Titles and Registration, has certified that there will not be a significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Craig has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments is the ability to renew already issued non-profit organizational plates at the initial issuance price.

There are no anticipated economic costs for persons required to comply with the amendments. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the amendments to §217.22 and §217.40 may be submitted to Mike Craig, Interim Director, Vehicles Titles and Registration, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on October 12, 2010.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the Texas Motor Vehicles Board with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§504.004, 504.6011, 504.802, 504.851, and 504.853.

§217.22. Motor Vehicle Registration.

(a) - (b) (No change.)

(c) Vehicle registration insignia.

(1) On receipt of a complete initial application for registration with the accompanying documents and fees, the department will issue vehicle registration insignia to be displayed on the vehicle for which the registration was issued for the current registration period.

(A) (No change.)

(B) If the vehicle has no windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the rear license plate, except that registration receipts, retained inside the vehicle, may provide the record of registration for vehicles with permanent trailer plates.

(C) (No change.)

(2) - (4) (No change.)

(d) Vehicle registration renewal.

(1) (No change.)

(2) The department will send [~~mail~~] a license plate renewal notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner [~~approximately six to eight weeks~~] prior to the expiration of the vehicle's registration.

(3) The license plate renewal notice should be returned by the vehicle owner to the appropriate county tax assessor-collector or to the tax assessor-collector's deputy, either in person or by mail, unless the vehicle owner renews via the Internet. [~~The registration renewal notice may be used in connection with the renewal of registration at selected county tax assessor-collector offices via the Internet.~~] The renewal notice must be accompanied by the following documents and fees:

(A) - (C) (No change.)

(4) - (6) (No change.)

(7) License plate reissuance program. The county tax assessor-collectors shall issue new multi-year license plates at no additional charge at the time of registration renewal provided the current plates are over seven years old from the date of issuance, including permanent trailer plates.

(e) - (l) (No change.)

§217.40. Marketing of Specialty License Plates through a Private Vendor.

(a) - (g) (No change.)

(h) License plate categories and associated fees. The categories and the associated fees for vendor specialty plates are set out in this subsection.

(1) Custom license plates. The fees for issuance of custom license plates are $85 for one year, $225 for five years, and $325 for ten years. Custom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with either three alpha and two or three numeric characters or two or three numeric and three alpha characters. Generic license plates on standard white sheeting with the word "Texas" that may be personalized with up to six alphanumeric characters are considered custom license plates before December 2, 2010.

(2) T-Plates (Premium) license plates. T-Plates (Premium) license plates may be personalized with up to seven alphanumeric characters on colored backgrounds or designs approved by the department. T-Plates (Premium) license plates will be made available to coincide with extraordinary events of public interest to Texas registrants. The fees for issuance of T-Plates (Premium) license plates are $95 for one year until December 2, 2010, $155 for one year on or after December 2, 2010, $395 for five years, and $495 for ten years.

(3) - (7) (No change.)

(8) Personalization and specialty plate fees [~~of license plates~~].

(A) (No change.)

(B) The personalization fee for plates applied for after November 19, 2009 is $40 if the plates are issued pursuant to Transportation Code, Chapter 504, Subchapters G and I.

(C) If the plates are renewed annually, the personalization and specialty plate fees remain the same fee as at the time of issuance if a sponsor of a specialty license plate authorized under Transportation Code, Chapter 504, Subchapters G and I signs a contract with the vendor in accordance with Transportation Code, Chapter 504, Subchapter J.

(i) - (k) (No change.)

(l) Transfer of vendor specialty license plates.

(1) (No change.)

(2) Transfer between owners. Vendor specialty license plates may not be transferred between persons unless the license plate pattern was initially purchased [~~except~~] through auction as provided in subsection (h)(7) of this section. An auctioned alphanumeric pattern may be transferred as a specialty license plate or as a virtual pattern to be manufactured on a new background as provided under the restyle option in subsection (n)(1) of this section. In addition to the fee paid at auction, the new owner of an auctioned alphanumeric pattern or plate will pay the department a fee of $25 and complete the department's prescribed application at the time of transfer.

(m) - (n) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005008
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 10, 2010
For further information, please call: (512) 463-8683

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 175. FEES AND PENALTIES

22 TAC §175.1

The Texas Medical Board withdraws the proposed amendment to §175.1 which appeared in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6177).

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005084
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: August 30, 2010
For further information, please call: (512) 305-7016

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER I. TEXAS EQUINE INCENTIVE PROGRAM

4 TAC §17.505

The Texas Department of Agriculture (the department) adopts an amendment to Chapter 17, Subchapter I, §17.505, concerning certain information required for opting out of the Texas Equine Incentive Program (TEIP), without changes to the proposal published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4816). The amendment is adopted to delete §17.505(c)(3) in order to eliminate the requirement for the department to keep a list of mares bred in Texas, including those mares bred by stallions that do not participate in the program. The department has determined that it is more administratively convenient to only keep information pertaining to eligible stallions. The amendment also simplifies the requirements for opting out of the TEIP.

No comments were received on the proposal.

The amendment of §17.505 is adopted pursuant to the Texas Agriculture Code §12.044, as established by HB 1881, 81st Texas Legislature, R.S., which authorizes the department to establish rules and to administer an equine incentive program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005098
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: September 19, 2010
Proposal publication date: June 11, 2010
For further information, please call: (512) 463-4075

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4 TAC §17.508, §17.510

The Texas Department of Agriculture (the department) adopts new Chapter 17, Subchapter I, §17.508 and §17.510, concerning the Texas Equine Incentive Program (TEIP), without changes to the proposal published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2425). The new sections are adopted to fulfill the mandate of the 81st Texas Legislature in accordance with House Bill 1881 (HB 1881), now codified at Texas Agriculture Code, §12.044, which creates the TEIP and requires the department to adopt rules to establish and administer the program. New §17.508 provides requirements for foals to be eligible for awards under the program. New §17.510 provides consequences for failure to file a timely breeding report and pay program fees.

Comments were received regarding §17.508. The comments received in opposition to §17.508 objected on the basis that horses eligible for awards under racing events would not be on an equal basis with horses eligible for awards under "show" or "halter" events, as a horse must be at least two years old in order to be eligible for awards for racing events. Other comments were received in favor of the proposal, stating that by allowing yearlings to compete in halter events, the department will encourage participation in the program. In regards to the comments in opposition to the proposal, the department believes that there will not be an inequality in awards between race horses and other horses. As a practical matter, no program awards will be made for calendar year 2011, because the department has determined that it must let the TEIP fund increase in size prior to making awards. Also, the department, in consultation with the Legislative Budget Board, has determined that legislative action will be required to make adjustments to the TEIP fund, so that the department has clear authority to administer the TEIP fund and to make awards from the fund. Thus, the earliest possible award to any owner with a horse participating in the TEIP program will be the calendar year 2012. Additionally, the department plans on making awards by class (i.e., "non-racing" or "racing") and by eligible breed association. Thus, an owner of a horse participating in a non-racing event would only be eligible for an award based on the amount paid in by stallion owners for foals that actually participate in non-racing events. During any calendar year, TEIP fees paid in for a racing horse would not be included in the awards for non-racing horses, just as fees paid on behalf of horses in a particular breed association will not be available for awards to other horses included in a different breed association.

No comments were received regarding §17.510.

New Chapter 17, Subchapter I, §17.508 and §17.510 are adopted pursuant to House Bill 1881, 81st Legislature, R.S., 2009 (HB 1881), codified at Texas Agriculture Code, §12.044, which creates the Texas Equine Incentive Program and requires the department to adopt rules to establish and administer the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005097
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: September 19, 2010
Proposal publication date: March 26, 2010
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §§3.1, 3.14, 3.15, 3.21, 3.78

The Railroad Commission of Texas (Commission) adopts amendments to §3.1 and §3.14, relating to Organization Report; Retention of Records; Notice Requirements; and Plugging; new §3.15, relating to Surface Equipment Removal Requirements and Inactive Wells; and amendments to §3.21 and §3.78, relating to Fire Prevention and Swabbing; and Fees and Financial Security Requirements, to implement House Bill (HB) 2259, 81st Legislature (Regular Session, 2009), which becomes effective September 1, 2010. The Commission adopts new §3.15 with changes and adopts §§3.1, 3.14, 3.21, and 3.78 without changes to the proposed versions published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5407). HB 2259 amended the Texas Natural Resources Code to establish requirements for disconnecting electrical service, purging fluids from tanks, lines, and vessels, and removing surface equipment from inactive land wells. HB 2259 also amended the Texas Natural Resources Code to establish requirements for all operators to address their inventories of inactive wells annually in order to obtain approval of their yearly organization reports. The statutory amendments provide operators with three primary options for addressing their inactive land wells: restoring wells to active status; plugging wells that have no current or potential future utility; and, obtaining plugging extensions for wells that have a future utility, but economically cannot be restored to current active status.

HB 2259 amended the Texas Natural Resources Code to address two issues related to inactive land wells: (1) the dangers posed by live electrical lines routed to inactive wells; and (2) the increased costs to plug inactive wells. HB 2259 reflects the work of the Inactive Well Study Group, formed in 2007, which included associations representing both industry and landowners. HB 2259 applies only to land wells and expressly does not apply to bay and offshore wells. The purpose of the amendments to the Texas Natural Resources Code and the Commission's new and amended rules is to prevent threats to public health and safety that may result from improperly monitored and maintained inactive land wells.

The new and amended rules implement the new statutory requirements to disconnect electrical service; purge liquids from lines, tanks, and vessels; and remove surface equipment from inactive land wells. As set forth in the amendments to the Natural Resources Code, surface equipment removal requirements are based on how long a well has been inactive. For all inactive wells, defined as those that have not reported any production or activity in the preceding 12 months, the electrical lines must be disconnected. If a well has been inactive for five years, the operator must purge all tanks, lines, and vessels of fluids. Finally, the operator must remove all surface equipment for any well that has been inactive for 10 years or longer.

The new and amended rules implement the new statutory requirements for all operators to address their inventories of inactive wells annually in order to obtain approval of their yearly organization reports. The rules provide operators with three primary options for addressing their inactive land wells: restoring wells to active status; plugging wells that have no current or potential future utility; and obtaining plugging extensions for wells that have a future utility, but economically cannot be restored to current active status.

The new and amended rules implement the new statutory requirements for plugging extensions to include blanket options that address an operator's complete inventory of inactive wells by (1) plugging or restoring to active status that number of wells equal to 10% of an operator's wells that were inactive in the 12 months prior to the filing of the organization report; (2) posting blanket financial assurance; or (3) if publicly traded, either filing with the Commission financial documents naming the Commission as secured creditor or posting a blanket bond.

Finally, the new and amended rules for plugging extensions include five options that operators can use on a well-by-well basis: (1) an operator can submit an abeyance of plugging report in which an engineer or geoscientist certifies the future beneficial use of the well with a $100 fee; (2) if an operator is not otherwise required to file a fluid level or pressure test, the operator can file a fluid level test or a pressure test for an individual well with a $50 fee; (3) an operator can opt to post additional financial assurance based on estimated costs to plug an individual inactive well in the form of a supplemental bond, letter of credit or cash deposit; (4) an operator may make an annual deposit of at least 10% of the estimated cost to plug an inactive well; the Commission will hold the deposit in an escrow; and (5) an operator may certify that an individual inactive well is part of an approved enhanced oil recovery (EOR) project.

Between January 28 and March 15, 2010, the Commission published on its website the draft proposed rules to solicit informal comments. Additionally, the Commission mailed notice of the draft proposed rules to all operators. The Commission received comments from the Inactive Well Study Group, industry associations, landowner associations, and individual oil and gas companies. The Commission considered all comments and incorporated a number of the suggested changes in the amended proposal that was published in the June 25, 2010, issue of the *Texas Register.*

The Commission received one comment on the published proposed amendments and new rule from the Texas Oil and Gas Association (TXOGA). TXOGA did not specifically state its agreement with or opposition to the proposed amendments and new rule in their entirety, but made suggestions to change the wording in some provisions.

TXOGA offered two general comments. First, TXOGA suggested that throughout the amendments and new rule, the term

"its delegate" should be replaced with "executive director." The Commission disagrees with this comment; the term "delegate" allows for administrative approval by any designated Commission staff rather than only the executive director. Second, TXOGA recommended that references to specific forms should be replaced with "the appropriate form" to avoid having to amend the rule any time a new form is created. The Commission disagrees with this comment as well. The reference in the rule text to the specific form to be used to meet the requirements of a rule is necessary to meet the mandate of the Administrative Procedure Act that agencies adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Regarding §3.1, TXOGA commented that the Commission should adopt a new subsection (d)(4) which would allow operators to file an organization report 90 days prior to the deadline. If an operator does so, the Commission would be required to respond no later than 60 days prior to the renewal date with either a denial of the application or a statement disputing any element of the application package. If the Commission denies or disputes any element of the application, the operator would have 30 days to respond to the Commission. If the Commission does not deny or dispute any element of the application 60 days prior to the renewal date, the application would be considered accepted by the Commission as filed. On the renewal date, if any element of the application remained unresolved, the Commission could either renew the organization report pending resolution of unresolved matters or renew the applicant's organization report contingent on an agreed compliance order with the applicant.

The Commission disagrees with this comment. The suggested challenge process is broadly worded to allow an operator to contest any element associated with the filing of its annual renewal of its organization report, not just the wells that were classified as inactive and the time period of inactivity. Further, the question of regulatory responsibility for a specific well is already defined in Texas Natural Resources Code, §89.002, which states that upon Commission approval of the Commission form designating the operator of the well, the designated operator is responsible for regulatory compliance. The challenge process suggested in the informal comments is inconsistent with the existing statute that defines an operator's regulatory responsibility.

TXOGA also commented that the Commission should adopt a new §3.1(d)(5) which would require the Commission to provide an annual list of inactive wells so that operators know which wells must be addressed for the purpose of renewing the operator's organization report. The Commission would be required to provide the list at least three months before the renewal date of the operator's prior organization report. On or before the date the operator is required to renew the operator's organization report, an operator of an inactive well must plug or otherwise address pursuant to Commission rule the wells on the list which was provided at least three months before the renewal date of the operator's prior organization report.

The Commission disagrees with this comment. The Commission recognizes that identification of an operator's inactive wells is necessary, but points out that operators already are given a monthly print-out in the proration schedule that identifies all wells operated by the company. Additionally, the Commission has now completed a new searchable database, available to all operators and the general public, that can provide a monthly update of an operator's inactive wells. This database, called the Inactive Well Aging Report (IWAR), can be accessed at the Commission's website through the following link: http://www.rrc.state.tx.us/iwar/index.php. The Commission therefore concludes that it is not necessary to adopt within the amendments to §3.1 an obligation that the Commission identify an operator's inactive wells, because that information is readily available and easily accessible as a matter of public record.

With respect to §3.14, TXOGA suggested that the Commission revise the definition of Groundwater Conservation District to be consistent with the definition found in the Texas Water Code. The Commission disagrees with this comment because the suggested change is beyond the scope of this rulemaking project.

The Commission received comments suggesting changes to the definition of "enhanced oil recovery project" as that term is defined in §3.15(a)(4) and used in §3.15(f)(2)(B)(v) and §3.15(k)(1). The Commission has determined that it is not appropriate to make changes to the definition that would be inconsistent with the definitions in Texas Natural Resources Code, §89.002, enacted by HB 2259.

TXOGA also suggested revising new §3.15(a)(4), to allow projects approved under §3.46 as EOR projects. The Commission disagrees with this comment; Commission approval of an EOR project is required under the definition found in Texas Natural Resources Code, §89.002. Approval under §3.46 alone does not meet the statutory definition.

TXOGA commented that the definition of "inactive well" in §3.15(a)(6) should mirror the language in HB 2259, reasoning that in practice there may be issues determining when a well is actually drilled and that these issues were not contemplated in HB 2259. The Commission disagrees with this comment. The Commission's definition properly includes inactive wells that have been drilled but that are not on the current proration schedule. An operator's failure to file the appropriate completion forms or other required forms is not a legal basis for an exemption from the inactive well requirements.

TXOGA commented that the Commission should revise §3.15(d)(3) to provide that the Commission may require, as a condition of approving a change of ownership, that the inactive well be addressed within six months. TXOGA asserted that the section as proposed would inhibit commerce by making sales of oil and gas assets more difficult. Wells are most often packaged for selling and are not sold individually, but because the current draft does not allow transferring of wells for six months, it will no longer be workable to purchase packages.

The Commission disagrees with this comment. The intent of HB 2259 is to require the operator of record of an inactive well to bring it into compliance using one of the three methods permitted: plugging the well, producing the well, or obtaining a plugging extension for the well. The Commission has concluded that the six-month time period for bringing an inactive well into compliance after acquisition by a new operator was not intended to be a pass-through provision which would recycle or restart the compliance period in the event of subsequent transfers.

The comments' suggestion to shift the responsibility for compliance within the six-month time period is inconsistent with the definition of the operator of a well in Texas Natural Resources Code, §89.002, and with the requirements for an operator of a well to comply with all applicable statutes, rules, and orders set forth in Texas Natural Resources Code, §89.011. It would be administratively burdensome for the Commission to distinguish those multiple sales transactions that cause concern from other

types of operator transfers. The Commission finds that the proposed condition could allow operators to dispute which operator was required to comply with the rule in the event of a Commission enforcement proceeding.

The condition of a well and its status are readily obtained through public records kept by the Commission. There is no Commission rule specifying when an entity acquiring a well must file a request to be designated as the operator of a well. Where the inactive status of a well is known, parties can negotiate provisions in the acquisition agreement that specify when a request to be designated as the operator for a specific inactive well would be filed. In other words, if the parties to an acquisition agreement are aware that some of the wells will be subject to a secondary sale, the filing of an operator designation form can be delayed until it is determined which operator will operate the well.

The Commission also finds that requiring an operator that acquires an inactive well to bring it into compliance within the six-month time period will give the operator of record an incentive to ensure that actual compliance with the inactive well rule is obtained instead of outsourced. At the very least, compliance within the six-month time period would require disclosures and consideration as part of a negotiated transaction. Finally, the Commission notes that under proposed new §3.15(m)(7), the results of a fluid level or hydraulic pressure test submitted to support an individual well plugging extension are transferable to a new operator. For these reasons, the Commission has not included the suggested changes to proposed new §3.15(d)(3).

With respect to new §3.15(f)(2)(B)(v) and (k)(1), TXOGA recommended that the Commission delete the term "commission approved" for an EOR project. The Commission disagrees with this comment. As stated in the response to TXOGA's comment on §3.15(a)(4), Commission approval of an EOR project is required; approval under §3.46 alone does not meet the statutory definition found in Texas Natural Resources Code, §89.002.

TXOGA commented that in §3.15(i)(2), the Commission should provide an opportunity for a surface owner agreement to allow storage of equipment. The Commission disagrees with this comment. Texas Natural Resources Code, §89.029(c) requires that the Commission's rules restrict the accumulation of equipment removed from inactive wells on active leases.

Regarding §3.15(i)(4), TXOGA suggested that, to allow an operator discretion regarding the use of equipment, the term "required for" should be deleted and the term "associated with current and future operations of" substituted in its place. The Commission agrees with this comment and adopts the clarified wording as recommended.

Regarding §3.15(i)(5), TXOGA recommended deleting the word "plugged" because the statute does not require operators to plug wells. The Commission agrees with this comment and has revised the language to note that plugging is one of three alternatives for compliance. As adopted, the paragraph reads: "For land wells that have been inactive for more than 10 years as of September 1, 2010, an operator must file documentation with its annual organization report filing to demonstrate that the operator has restored these wells to active operation; plugged and removed the surface equipment from these wells; or removed the surface equipment and obtained a plugging extension for these wells under the following schedule."

TXOGA noted that in §3.15(l)(3), the Commission should add the term "fluid level test," which appears to have been left out, and add language noting the annual requirement. The Commission disagrees with this comment. The Commission finds that for wells that are more than 25 years old and that have been inactive for more than 10 years, the requirement to perform a hydraulic pressure test is consistent with the other requirements enacted by HB 2259 for wells that have been inactive for more than 10 years.

Finally, TXOGA suggested adding language in §3.15(l)(6) and (m)(6) that allows an operator to submit the original pressure recording chart, "or its modern equivalent." The Commission agrees and adds clarifying language to permit the filing of electronic data to satisfy this requirement.

The Commission adopts amendments to §3.1 to add new subsection (d) to address organization reports for operators of inactive wells. New subsection (d)(1) implements the new statutory requirement conditioning the approval of an operator's organization report on approval of plugging extensions for any inactive wells. New subsection (d)(2) allows the Commission to approve conditionally an organization report pending an operator's compliance with respect to a well that was inactive when approved within six months after the Commission approves the operator designation form. New subsection (d)(3) allows the Commission to revoke conditional approval of an organization report if the operator fails to bring the well into compliance within six months after the Commission approved the operator designation form.

The Commission adopts amendments to §3.14 to remove definitions and subsections related to plugging extensions that are either inapplicable or are included in new §3.15. Additionally, the provisions related to the requirement that surface casing be left in place for wells, currently addressed in §3.15, are included in §3.14(e)(5). In a separate, concurrent rulemaking, the Commission adopts the repeal of current §3.15 and here adopts a new §3.15, relating to Surface Equipment Removal Requirements and Inactive Wells. The Commission adopts new §3.15 to implement the new statutory requirements enacted by HB 2259 related to surface equipment requirements and inactive wells.

The Commission adopts new §3.15(a)(1) to include definitions related to surface equipment requirements and inactive wells. The definitions of "active operation," "good faith claim," and "operator designation form" are the same definitions currently found in §3.14. New definitions in §3.15(a)(1) include: "cost calculation for plugging an inactive well," "enhanced oil recovery (EOR) project," "inactive well," and "physical termination of electric service to the well's production site," all of which are terms defined by the new statutory requirements and are included in the definitions in the new rule for convenience.

The Commission adopts new §3.15(b) and (c) to clarify that the existing requirements for plugging, additional financial assurance, and extensions related to inactive bay and offshore wells remain unchanged. Texas Natural Resources Code §89.021, enacted by HB 2259, expressly excludes bay and offshore wells from the new surface equipment and inactive well requirements.

The Commission adopts new §3.15(d)(1) to describe the three initial options to bring an inactive land well into compliance with Commission rules. The subsection provides that an operator may plug any inactive well; restore any inactive well to active status; or obtain a plugging extension for the inactive well. New §3.15(d)(1) further specifies that an operator has six months after the operator assumes responsibility for an inactive well to bring it into compliance.

New §3.15(d)(2) specifies that a well plugging exception cannot be obtained if a well is otherwise required to be plugged by Commission rule or order.

New §3.15(d)(3) provides that the Commission will not approve a new operator designation for an inactive well submitted within the six months after the operator assumes responsibility, except to allow for a change in the operator's name.

New §3.15(d)(4) sets forth the procedure under which the Commission will revoke an operator's organization report if it fails to bring an inactive well into compliance within the six-month time period. This procedure includes providing notice to the operator of the intent to revoke the organization report and advising the operator of the opportunity to request a hearing to contest the proposed revocation.

New §3.15(d)(5) identifies that for operators with delinquent or revoked organization reports, any subsequent approval of the organization report must be coupled with simultaneous approval of plugging extensions for any inactive land wells.

New §3.15(e) sets forth the requirements for obtaining a plugging extension. These requirements are currently found in §3.14 and are restated in new §3.15(e) for administrative convenience and to avoid confusion from referring to multiple Commission rules. Under the requirements, operators must obtain approval of plugging extensions; maintain a current organization report; provide evidence of a good faith claim of a continuing right to operate if requested by the Commission; maintain the well and associated facilities in compliance with all applicable Commission rules and orders; and, for inactive wells more than 25 years old, successfully conduct and obtain Commission approval of a fluid level test or mechanical integrity test for the well.

New §3.15(f) sets forth the requirements to obtain approval of a plugging extension for an inactive land well. New §3.15(f)(1) specifies that the requirements for obtaining a plugging extension are not applicable to bay and offshore wells.

New §3.15(f)(2)(A) sets forth the surface equipment removal requirements for inactive land wells which must be met before the Commission can approve a plugging extension for a well. The required certification must be made by an individual with personal knowledge of the physical condition of the inactive well and must affirm compliance with surface requirements, including the termination of electrical service, emptying and purging of all pipes, tanks, and vessels for inactive wells more than five years old but less than ten years old, and removal of all surface equipment for inactive wells more than ten years old. If the operator owns the surface of the land on which the well is located, the operator may obtain exceptions to the requirements to purge liquids and remove surface equipment.

New §3.15(f)(2)(B) lists the alternatives an operator may choose from to obtain a plugging extension for any inactive land well. New §3.15(f)(2)(B)(i), (ii), and (iii) are the alternatives an operator can use to obtain a blanket plugging extension for all inactive land wells. These options include plugging or restoring to active status 10% of the number of inactive land wells operated at the time of the last annual renewal of the operator's organization report; for publicly traded entities, filing copies of federal documents to comply with asset retirement obligations and a Uniform Commercial Code Form 1 Financing Statement naming the operator as a debtor and the Commission as a secured creditor in the amount of the cost calculation for plugging all inactive land wells; and filing supplemental financial assurance in the amount of the estimated cost calculation for plugging all inactive land wells or $2,000,000. The Commission adopts a minor change in subsection (f)(2)(B)(i) to change the word "percent" to the "%" symbol.

New §3.15(f)(2)(B)(iv), (v), (vi), (vii), and (viii) set forth the alternatives an operator may select from to obtain an individual well plugging exception. The exception alternatives include: submitting an abeyance of plugging report and payment of a $100 annual fee; providing a statement that the well is part of a Commission-approved EOR project; conducting a successful fluid level or hydraulic pressure test, if not otherwise already required to perform such a test by Commission rule or order, and payment of a $50 annual fee; filing individual well supplemental financial assurance in the amount at least equal to the cost calculation for plugging the specified inactive land well; and annually depositing into an escrow fund maintained by the Commission 10% of the cost calculation for plugging an inactive land well. The Commission adopts minor changes in (f)(2)(B)(viii) to change the word "percent" to the "%" symbol.

New §3.15(g) provides that if the Commission administratively denies an application for a plugging extension, the operator may request a hearing by filing a request for a hearing with the Office of General Counsel no later than 30 days from the date of the administrative denial.

New §3.15(h) allows the Commission to revoke a plugging extension for an inactive land well if it determines, after notice and opportunity for hearing, that the applicant is ineligible for the extension under the Commission's rules and orders.

New §3.15(i) sets forth the requirements for the removal of surface equipment for land wells inactive for more than 10 years. The rule specifies that when removing surface equipment, operators must still comply with all other Commission rules and orders, including the requirements related to naturally occurring radioactive materials (NORM).

New §3.15(i)(1) specifies that a sign, as required under §3.3, relating to Identification of Properties, Wells and Tanks, be clearly visible at the wellhead, and that wellhead control be maintained as required under §3.13, relating to Casing, Cementing, Drilling, and Completion Requirements. New §3.15(i)(2) prohibits the storage of surface equipment removed from an inactive land well on an active lease.

New §3.15(i)(3) allows an operator to apply for a temporary extension of the deadline for plugging an inactive well or removing surface equipment if compliances cannot be obtained due to safety concerns or required well site maintenance. An operator must include in an application for a temporary exemption a written affirmation of the facts setting forth the safety concerns or maintenance issues.

New §3.15(i)(4) provides that an operator may be eligible for a plugging extension without complying with the surface equipment removal requirements if the inactive well is associated with an EOR project. As adopted with clarifying changes, an operator must include in its application for an exemption a written affirmation that the well is part of the EOR project and applies only to the equipment associated with current and future operations of the EOR project.

New §3.15(i)(5) sets forth the five-year phase-in period provided for in Texas Natural Resources Code, §89.029(f), to remove surface equipment from wells that have been inactive for more than 10 years as of September 1, 2010. New §3.15(i)(5) specifies the percentage of wells that must be brought into compliance

in each year as a product of the total population of wells. As adopted with clarifying language, paragraph (5) requires that for land wells that have been inactive for more than 10 years as of September 1, 2010, an operator must file documentation with its annual organization report filing to demonstrate that the operator has restored these wells to active operation; plugged and removed the surface equipment from these wells; or removed the surface equipment and obtained a plugging extension for these wells under the prescribed schedule. Additionally, the rule incorporates the Commission's implementation of the requirements through review of the annual organization report filings, as opposed to requiring all operators to provide such documentation on September 1 of each calendar year.

New §3.15(i)(6) and (7) set forth requirements to remove surface equipment from wells that have been inactive for more than 10 years if the inactive land well is transferred or becomes a 10-year inactive well after September 1, 2010. In both cases, the provisions require the operator to plug the well, restore the well to active status, or bring the well into compliance with surface equipment removal requirements within six months after the transfer of the 10-year inactive date. The provisions also specify that compliance with these requirements does not count toward fulfillment of the requirements of Texas Natural Resources Code, §89.029(f), to remove surface equipment from wells that have been inactive for more than 10 years as of September 1, 2010.

New §3.15(j) sets forth the requirements for obtaining an individual inactive well plugging extension through the abeyance of plugging report alternative. To obtain a plugging extension through this option, an operator must pay a $100 fee; file an application on the designated Commission form; provide a certification from a licensed professional engineer or geoscientist that the well has a reasonable expectation of both an economic value in excess of the estimated plugging cost and restoration to a beneficial use that will prevent waste of oil or gas resources which would not otherwise be produced if the well were plugged; and submit documentation demonstrating the basis for the affirmation of future utility. New §3.15(j)(2) and (3) further provide that an abeyance of plugging report plugging extension may not be transferred to a new operator except in the event of a change of name of an operator.

New §3.15(k) sets forth the requirements for obtaining an individual inactive well plugging extension through the enhanced oil recovery (EOR) project alternative. An operator can obtain a plugging extension through this option if the inactive well is located on a unit or lease or in a field associated with a Commission-approved EOR project. New §3.15(k)(2) and (3) further provide that an approved EOR plugging extension may not be transferred to a new operator except in the event of a change of name of an operator.

New §3.15(l) sets forth the requirements for conducting a fluid level test on an inactive well more than 25 years old. These requirements are currently found in §3.14(b)(3). In new §3.15(l), the Commission makes two changes to the current testing requirements related to giving notice to the District Office. Under the new rule, notice to the District Office is required three days prior to the test instead of the current requirement of 48 hours. This change is consistent with the notification requirement set by statute prior to conducting a fluid level or hydraulic pressure test in an application for an inactive well plugging extension. Second, the Commission requires that for inactive wells that are more than 25 years old and more than 10 years inactive, the operator must conduct a hydraulic pressure test once every five years.

New §3.15(m) sets forth the requirements for obtaining an individual inactive well plugging extension through the fluid level or hydraulic pressure test alternative. If an operator is not otherwise required to perform a fluid level or hydraulic pressure test by Commission rule or order, to obtain a plugging extension through this option an operator must pay a $50 fee; provide three days notice of the test to the district office; and file documentation of the test results with the Commission's office in Austin within 30 days after the test is performed. New §3.15(m)(6) provides that if a hydraulic pressure test is performed, the results of the test are valid for five years from the date of the test. New §3.15(m)(7) provides that the results of a fluid level or hydraulic pressure test filed in support of an individual well plugging extension are transferable to a new operator.

In both new §3.15(l)(6) and (m)(6), the Commission adopts clarifying language that allows an operator to file an electronic equivalent to the paper original pressure reading chart for hydraulic pressure tests.

New §3.15(n) sets forth the requirements for obtaining an individual inactive well plugging extension through the filing of supplemental financial assurance. New §3.15(n)(1) clarifies that any supplemental financial assurance filed for an extension for an inactive land well is in addition to any other required financial assurance. New §3.15(n)(2) provides that supplemental financial assurance is not transferable. Operators acquiring an existing inactive land well must file a new supplemental financial assurance instrument.

New §3.15(o) sets forth the requirements for obtaining an individual inactive well plugging extension through the deposit of funds into a Commission-maintained escrow account. The amount of the deposit must be at least 10% of the calculated cost of plugging the well in each year this option is requested. For example, if an operator deposits escrow funds to obtain a plugging extension for an inactive well for two consecutive years, the operator must deposit total funds equal to at least 20% of the calculated cost to plug the well. The Commission will release escrowed funds consistent with the existing requirements for the release of financial assurance set forth in §3.78, relating to Fees and Financial Security Requirements.

New §3.15(p) allows an operator to claim a future credit toward the 10% blanket plugging exception alternative if the operator plugs more than 10% of the number of its inactive land wells during a 12-month organization report cycle. The future credit is limited to plugged wells and would apply only to the next organization report renewal period. The Commission proposes this credit in response to an informal comment that allowing this credit would be an incentive for an operator to continue to plug inactive land wells during a calendar year even if the operator has already plugged enough wells to meet the 10% blanket plugging exception requirement. The Commission adopts minor changes in this subsection to change the word "percent" to the "%" symbol.

Amendments in §3.21 incorporate the requirements set forth in Texas Natural Resources Code, §91.019, relating to the operation and maintenance of electrical power lines, in a new subsection (l). Under new §3.21(l) an operator must construct, operate, and maintain an electrical power line serving a well site or other affiliated surface facility in accordance with the National Electri-

cal Code as adopted by the Texas Department of Licensing and Regulation.

Amendments in §3.78 define the term "escrow funds" and set forth the fees required for individual inactive well plugging extensions based on an abeyance of plugging report or the filing of a fluid level or hydraulic pressure test. The Commission defines "escrow funds" in §3.78(a)(13) as funds deposited with the Commission as part of an application for a plugging extension for an inactive land well. The inactive well plugging extension fees are set forth in new §3.78(b)(13)(A) and (B).

The Commission amends §3.78(i) to set forth the conditions for the deposit of escrow funds. The Commission will deposit all escrow funds in a special account within the Oil Field Clean Up Fund account. Any interest accruing on the deposited funds will be deposited into the Oil Field Clean Up Fund pursuant to Texas Natural Resources Code, §91.111(c)(8). The Commission will release escrow funds to the current operator of a well only if the well is either restored to active status or plugged in accordance with Commission rules. In other words, in the event of a well transfer, the Commission will release the escrow funds only to the new operator, not the operator that may have deposited the funds initially. Additionally, the Commission will release escrow funds only in the event that the current operator plugs the inactive well or restores it to active status. In the event that the well is plugged through the use of state funds, the Commission may collect from the escrow account in the amount necessary to reimburse the state for any expenditure.

The Commission adopts the amendments and new rule pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 89, Subchapter B-1, as enacted by HB 2259, relating to Plugging of Certain Inactive Wells; and Texas Natural Resources Code, §91.019, related to Standards for Construction, Operation, and Maintenance of Electrical Power Lines.

Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 89, Subchapter B-1; and Texas Natural Resources Code, §91.019, are affected by the new and amended rules.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 89, Subchapter B-1; and Texas Natural Resources Code, §91.019.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 89, Subchapter B-1; and Texas Natural Resources Code, §91.019.

Issued in Austin, Texas, on August 24, 2010.

§3.15. Surface Equipment Removal Requirements and Inactive Wells.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Active operation--Regular and continuing activities related to the production of oil and gas for which the operator has all necessary permits. In the case of a well that has been inactive for 12 consecutive months or longer and that is not permitted as a disposal or injection well, the well remains inactive for purposes of this section, regardless of any minimal activity, until the well has reported production of at least 10 barrels of oil for oil wells or 100 mcf of gas for gas wells each month for at least three consecutive months.

(2) Cost calculation for plugging an inactive well--The cost, calculated by the Commission or its delegate, for each foot of well depth plugged based on average actual plugging costs for wells plugged by the Commission for the preceding state fiscal year for the Commission Oil and Gas Division district in which the inactive well is located.

(3) Delinquent inactive well--An inactive well for which, after notice and opportunity for a hearing, the Commission or its delegate has not extended the plugging deadline.

(4) Enhanced oil recovery (EOR) project--A project that does not include a water disposal project and is:

(A) a Commission-approved EOR project that uses any process for the displacement of oil or other hydrocarbons from a reservoir other than primary recovery and includes the use of an immiscible, miscible, chemical, thermal, or biological process;

(B) a certified project described by Texas Tax Code, §202.054; or

(C) any other project approved by the Commission or its delegate for EOR.

(5) Good faith claim--A factually supported claim based on a recognized legal theory to a continuing possessory right in a mineral estate, such as evidence of a currently valid oil and gas lease or a recorded deed conveying a fee interest in the mineral estate.

(6) Inactive well--An unplugged well that has been spudded or has been equipped with cemented casing and that has had no reported production, disposal, injection, or other permitted activity for a period of greater than 12 months.

(7) Physical termination of electric service to the well's production site--Disconnection of the electric service to an inactive well site at a point on the electric service lines most distant from the production site toward the main supply line in a manner that will not interfere with electrical supply to adjacent operations, including cathodic protection units.

(8) Operator designation form--A certificate of compliance and transportation authority or an application to drill, recomplete, and reenter that has been approved by the Commission or its delegate.

(b) Plugging of inactive bay and offshore wells required.

(1) An operator of an existing inactive bay or offshore well as defined in §3.78 of this title (relating to Fees and Financial Security Requirements) must:

(A) restore the well to active status as defined by Commission rule;

(B) plug the well in compliance with a Commission rule or order; or

(C) obtain the approval of the Commission or its delegate of an extension of the deadline for plugging an inactive bay or offshore well.

(2) The Commission or its delegate may not approve an extension of the deadline for plugging an inactive bay or offshore well if the plugging of the well is otherwise required by Commission rules or orders.

(c) Extension of deadline for plugging an inactive bay or offshore well. The Commission or its delegate may administratively grant

an extension of the deadline for plugging an inactive bay or offshore well as defined by Commission rules if:

(1) the operator has a current organization report;

(2) the operator has, and on request provides, evidence of a good faith claim to a continuing right to operate the well;

(3) the well and associated facilities are otherwise in compliance with all Commission rules and orders; and

(4) for a well more than 25 years old, the operator successfully conducts and the Commission or its delegate approves a fluid level or hydraulic pressure test establishing that the well does not pose a potential threat of harm to natural resources, including surface and subsurface water, oil, and gas.

(d) Plugging of inactive land wells required.

(1) An operator that assumes responsibility for the physical operation and control of an existing inactive land well must maintain the well and all associated facilities in compliance with all applicable Commission rules and orders and within six months after the date the Commission or its delegate approves an operator designation form must either:

(A) restore the well to active status as defined by Commission rule;

(B) plug the well in compliance with a Commission rule or order; or

(C) obtain approval of the Commission or its delegate of an extension of the deadline for plugging an inactive well.

(2) The Commission or its delegate may not approve an extension of the deadline for plugging an inactive land well if the plugging of the well is otherwise required by Commission rules or orders.

(3) Except for an operator designation form filed for the purpose of a name change, the Commission or its delegate may not approve an operator designation form for an inactive land well submitted within the six-month compliance period of paragraph (1) of this subsection until the operator satisfies the requirements of paragraph (1)(C) of this subsection.

(4) If an operator fails to restore the well to active status as defined by Commission rule, plug the well in compliance with a Commission rule or order, or obtain an extension of the deadline for plugging an inactive well within six months after acquiring an inactive well, the Commission or its delegate may, after notice and opportunity for hearing, revoke the operator's organization report.

(5) The Commission or its delegate may approve an organization report that is delinquent or has been revoked if the Commission or its delegate simultaneously approves extensions of the deadline for plugging the operator's inactive wells.

(e) Extension of deadline for plugging an inactive land well. The Commission or its delegate may administratively grant an extension of the deadline for plugging an inactive land well if:

(1) the Commission or its delegate approves the operator's Application for an Extension of Deadline for Plugging an Inactive Well (Commission Form W-3X);

(2) the operator has a current organization report;

(3) the operator has, and on request provides evidence of, a good faith claim to a continuing right to operate the well;

(4) the well and associated facilities are otherwise in compliance with all Commission rules and orders; and

(5) for a well more than 25 years old, the operator successfully conducts and the Commission or its delegate approves a fluid level or hydraulic pressure test establishing that the well does not pose a potential threat of harm to natural resources, including surface and subsurface water, oil, and gas.

(f) Application for an extension of deadline for plugging an inactive land well.

(1) This subsection does not apply to a bay well or an offshore well as those terms are defined in §3.78 of this title.

(2) An operator must include the following in an application for an extension of the deadline for plugging an inactive well:

(A) an affirmation made by an individual with personal knowledge of the physical condition of the inactive well pursuant to the provisions of Texas Natural Resources Code, §91.143, stating the following: that the operator has physically terminated electric service to the well's production site; and either:

(i) if the operator does not own the surface of the land where the well is located and the well has been inactive for at least five years but for less than 10 years as of the date of renewal of the operator's organization report, that the operator has emptied or purged of production fluids all piping, tanks, vessels, and equipment associated with and exclusive to the well; or

(ii) if the operator does not own the surface of the land where the well is located, and the well has been inactive for at least 10 years as of the date of renewal of the operator's organization report, that the operator has removed all surface equipment and related piping, tanks, tank batteries, pump jacks, headers, fences, and firewalls; has closed all open pits; and has removed all junk and trash, as defined by Commission rule, associated with and exclusive to the well; and

(B) documentation that the operator has satisfied at least one of the following requirements:

(i) for all inactive land wells that an operator has operated for more than 12 months, the operator has plugged or restored to active operation, as defined by Commission rule, 10% of the number of inactive land wells operated at the time of the last annual renewal of the operator's organization report;

(ii) if the operator is a publicly traded entity, for all inactive land wells, the operator has filed with the Commission a copy of the operator's federal documents filed to comply with Financial Accounting Standards Board Statement No. 143, Accounting for Asset Retirement Obligations, and an original executed Uniform Commercial Code Form 1 Financing Statement, filed with the Secretary of State, that names the operator as the "debtor" and the Railroad Commission of Texas as the "secured creditor" and specifies the funds covered by the documents in the amount of the cost calculation for plugging all inactive wells;

(iii) the filing of a blanket bond on Commission Form P-5PB(2), Blanket Performance Bond, a letter of credit on Commission Form P-5LC, Irrevocable Documentary Blanket Letter of Credit, or a cash deposit, in the amount of either the lesser of the cost calculation for plugging all inactive wells or $2 million;

(iv) for each inactive land well identified in the application, the Commission has approved an abeyance of plugging report and the operator has paid the required filing fee;

(v) for each inactive land well identified in the application, the operator has filed a statement that the well is part of a Commission-approved EOR project;

(vi) for each inactive land well identified in the application that is not otherwise required by Commission rule or order to conduct a fluid level or hydraulic pressure test of the well, the operator has conducted a successful fluid level test or hydraulic pressure test of the well and the operator has paid the required filing fee;

(vii) for each inactive land well identified in the application, the operator has filed Commission Form W-3X and the Commission or its delegate has approved a supplemental bond, letter of credit, or cash deposit in an amount at least equal to the cost calculation for plugging an inactive land well for each well specified in the application; or

(viii) for each time an operator files an application for a plugging extension and for each inactive land well identified in the application, the operator has filed Commission Form W3-X and the Commission or its delegate has approved an escrow fund deposit in an amount at least equal to 10% of the total cost calculation for plugging an inactive land well.

(g) Administrative denial of extension. The Commission or its delegate may administratively deny an application for a plugging extension for an inactive well if it does not meet the requirements of this section. In the event of an administrative denial, an operator may request a hearing. The operator must file the request for hearing with the Office of General Counsel, Hearings Section, Docket Services, no later than 30 days from the date of the administrative denial of the application. In the request for hearing, the operator must identify each well by its assigned American Petroleum Institute (API) number.

(h) Revocation of extension. The Commission or its delegate may revoke an extension of the deadline for plugging an inactive well if the Commission or its delegate determines, after notice and an opportunity for a hearing, that the applicant is ineligible for the extension under the Commission's rules or orders.

(i) Removal of surface equipment for land wells inactive more than 10 years. Requirements to remove surface equipment for land wells inactive more than 10 years do not excuse an operator from compliance with all other applicable Commission rules and orders including the requirements in Chapter 4 of this title (relating to Environmental Protection).

(1) An operator of an inactive land well must leave a clearly visible sign as required by §3.3 of this title (relating to Identification of Properties, Wells, and Tanks) at the wellhead of the well and must maintain wellhead control as required by §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements).

(2) An operator may not store surface equipment removed from an inactive land well on an active lease.

(3) An operator may be eligible for a temporary extension of the deadline for plugging an inactive land well or a temporary exemption from the surface equipment removal requirements if the operator is unable to comply with the requirements of subsection (f)(2)(A) of this section because of safety concerns or required maintenance of the well site and the operator includes with the application a written affirmation of the facts regarding the safety concerns or maintenance.

(4) An operator may be eligible for an extension of the deadline for plugging a well without complying with the surface equipment removal requirements for inactive land wells if the well is located on a unit or lease or in a field associated with an EOR project and the operator includes a statement in the written affirmation that the well is part of such a project. The exemption provided by this subsection applies only to the equipment associated with current and future operations of the project.

(5) For land wells that have been inactive for more than 10 years as of September 1, 2010, an operator must file documentation with its annual organization report filing to demonstrate that the operator has restored these wells to active operation; plugged and removed the surface equipment from these wells; or removed the surface equipment and obtained a plugging extension for these wells under the following schedule:

(A) at least 20% of the wells by the first renewal of the operator's organization report after September 1, 2011;

(B) at least 40% of the wells by the first renewal of the operator's organization report after September 1, 2012;

(C) at least 60% of the wells by the first renewal of the operator's organization report after September 1, 2013;

(D) at least 80% of the wells by the first renewal of the operator's organization report after September 1, 2014; and

(E) any wells remaining by the first renewal of the operator's organization report after September 1, 2015.

(6) Upon the transfer of a land well that has been inactive for more than 10 years as of September 1, 2010, to a new operator, the new operator must bring the well into compliance with the requirement to remove surface equipment not later than six months after the date the Commission or its delegate approves the Commission Form P-4 under which the new operator assumes responsibility for the well. The removal of surface equipment by a new operator after a transfer does not count toward the fulfillment of the requirements of paragraph (5) of this subsection for either operator.

(7) The operator of a land well that becomes inactive for more than 10 years after September 1, 2010, must bring the well into compliance with the requirement to remove surface equipment prior to the next renewal of the operator's annual organization report. The removal of surface equipment from such a well does not count toward the fulfillment of the requirements of paragraph (5) of this subsection.

(j) Abeyance of plugging report.

(1) An operator that files an abeyance of plugging report must:

(A) pay an annual fee of $100 for each inactive land well covered by the report;

(B) use Commission Form W-3X on which the operator must specify the field and the covered wells within that field; and

(C) for each well, include a certification signed and sealed by a person licensed by the Texas Board of Professional Engineers or the Texas Board of Professional Geoscientists stating that the well has:

(i) a reasonable expectation of economic value in excess of the cost of plugging the well for the duration of the period covered by the report, based on the cost calculation for plugging an inactive well;

(ii) a reasonable expectation of being restored to a beneficial use that will prevent waste of oil or gas resources that otherwise would not be produced if the well were plugged; and

(iii) documentation demonstrating the basis for the affirmation of the well's future utility.

(2) Except as provided in paragraph (3) of this subsection, the Commission or its delegate may not transfer an abeyance of plugging report to a new operator of an existing inactive land well. The new operator of an existing inactive land well must file a new abeyance of

plugging report or otherwise comply with the requirements of this subchapter not later than six months after the date the Commission or its delegate approves the new operator's request to be recognized as the operator of the well.

(3) The Commission or its delegate may transfer an abeyance of plugging report in the event of a change of name of an operator.

(k) Enhanced oil recovery (EOR) project.

(1) An inactive well is considered to be part of an EOR project if the well is located on a unit or lease or in a field associated with a Commission-approved EOR project.

(2) Except as provided in paragraph (3) of this subsection, the Commission and its delegate may not transfer a statement that an inactive well is part of an EOR project to a new operator of an existing inactive well. A new operator of an existing inactive well must file a new statement stating that the well is part of such an EOR project or otherwise comply with the provisions of this section not later than six months after the date the Commission or its delegate approves the new operator's request to be recognized as the operator of the well.

(3) The Commission or its delegate may transfer a statement that a well is part of an EOR project in the event of a change of name of an operator.

(l) Fluid level or hydraulic pressure test for inactive wells more than 25 years old.

(1) At least three days prior to the test, the operator must give the district office notice of the date and approximate time the operator intends to conduct a fluid level or hydraulic pressure test. The district office may require that a test be witnessed by a Commission employee. The district office may allow an operator to conduct a test even if notice of the test is provided to the district office fewer than three days prior to the test.

(2) No operator may conduct a test other than a fluid level or hydraulic pressure test without prior approval from the district director or the director's delegate.

(3) For each inactive well that is more than 25 years old and that has been inactive more than 10 years, the operator must have performed a hydraulic pressure test and obtained the approval of the Commission or its delegate once every five years.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, an operator may conduct a hydraulic pressure test without prior approval from the district director or the director's delegate, provided that the operator gives the district office written notice of the date and approximate time for the test at least three days prior to the time the test will be conducted; the production casing is tested to a depth of at least 250 feet below the base of usable quality water strata or 100 feet below the top of cement behind the production casing, whichever is deeper; and the minimum test pressure is greater than or equal to 250 psig for a period of at least 30 minutes.

(5) Using Commission Form H-15, each operator must file in the Commission's Austin office the results of a fluid level test within 30 days of the date the test was performed. The results are valid for a period of one year from the date of the test. Upon request by the Commission or its delegate, the operator must file the actual test data.

(6) Using Commission Form H-5 or Form H-15, each operator must file in the district office the results of a hydraulic pressure test, including the original pressure recording chart or its electronic equivalent, within 30 days of the date the test was performed. The results are valid for a period of five years from the date of the test, unless the Commission or its delegate requires the operator to perform testing more frequently to ensure that the well does not pose a threat of harm to natural resources.

(7) An operator of an inactive well that is more than 25 years old may not return that inactive well to active operation unless the operator performs either a fluid level test of the well within 12 months prior to the return to activity or a hydraulic pressure test of the well within five years prior to the return to activity.

(m) Fluid level or hydraulic pressure test for inactive land well less than 25 years old.

(1) At least three days prior to the test, each operator must give the district office notice of the date and approximate time the operator intends to conduct a fluid level or hydraulic pressure test. The district office may require that a test be witnessed by a Commission employee. The district office may allow an operator to conduct a test even if notice of the test is provided to the district office fewer than three days prior to the test.

(2) No operator may conduct a test other than a fluid level or hydraulic pressure test without prior approval from the district director or the director's delegate.

(3) Notwithstanding the provisions of paragraph (1) of this subsection, an operator may conduct a hydraulic pressure test without prior approval from the district director or the director's delegate, provided that the operator gives the district office written notice of the date and approximate time for the test at least three days prior to the time the test will be conducted; the production casing is tested to a depth of at least 250 feet below the base of usable quality water strata or 100 feet below the top of cement behind the production casing, whichever is deeper; and the minimum test pressure is greater than or equal to 250 psig for a period of at least 30 minutes.

(4) An operator that files documentation of a fluid level test or a hydraulic pressure test for an inactive land well less than 25 years old in order to obtain a plugging extension must pay an annual fee of $50 for each well covered by the documentation.

(5) Using Commission Form H-15, each operator must file in the Commission's Austin office the results of a fluid level test within 30 days of the date the test was performed. The results are valid for a period of one year from the date of the test. Upon request by the Commission or its delegate, the operator must file the actual test data.

(6) Using Commission Form H-5 or Form H-15, each operator must file in the district office the results of a hydraulic pressure test, including the original pressure recording chart or its electronic equivalent, within 30 days of the date the test was performed. The results are valid for a period of five years from the date of the test, unless the Commission or its delegate requires the operator to perform testing more frequently to ensure that the well does not pose a threat of harm to natural resources.

(7) The Commission or its delegate may transfer documentation of the results of a fluid level or hydraulic pressure test to a new operator of an existing inactive land well that is less than 25 years old.

(n) Supplemental financial assurance.

(1) A supplemental bond, letter of credit, or cash deposit filed as part of an application for an extension for an inactive land well is in addition to any other financial assurance otherwise required of the operator or for the well.

(2) The Commission or its delegate may not transfer a supplemental bond, letter of credit, or cash deposit to a new operator of an existing inactive land well. A new operator of an existing inactive land

well must file a new supplemental bond, letter of credit, or cash deposit or otherwise comply with the provisions of this section not later than six months after the date the Commission or its delegate approves an operator designation form.

(o) Escrow funds.

(1) An operator must deposit escrow funds with the Commission each time the operator files an application for an extension of the deadline for plugging an inactive well.

(2) The Commission or its delegate may release escrow funds deposited with the Commission only as prescribed by §3.78 of this title.

(p) Plugging more than 10% of inactive well inventory. If an operator plugs more than 10% of the number of inactive land wells during a 12-month organization report cycle, the Commission will count the number of plugged wells above 10% toward fulfillment of the 10% blanket option under subsection (f)(2)(B)(i) of this section during the next organization report cycle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004922
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: September 13, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 475-1295

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16 TAC §3.15

The Railroad Commission of Texas (Commission) adopts the repeal of §3.15, relating to Surface Casing To Be Left in Place, as part of a concurrent rulemaking proceeding to implement House Bill (HB) 2259, 81st Legislature (Regular Session, 2009), which becomes effective September 1, 2010, without changes to the proposal published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5423). HB 2259 amended the Texas Natural Resources Code to establish requirements for disconnecting electrical service, purging fluids from tanks, lines, and vessels, and removing surface equipment from inactive land wells. HB 2259 also amended the Texas Natural Resources Code to establish requirements for all operators to annually address their inventory of inactive wells to obtain approval of their yearly organization report. In a separate, concurrent rulemaking, the Commission adopts new §3.15, to be entitled Surface Equipment Removal Requirements and Inactive Wells, as well as some amendments to §§3.1, 3.14, 3.21, and 3.78, relating to Organization Report; Retention of Records; Notice Requirements; Plugging; Fire Prevention and Swabbing; and Fees and Financial Security Requirements, to address HB 2259.

The Commission received no comments on the proposed repeal.

The Commission adopts the repeal pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 89, Subchapter B-1, as enacted by HB 2259, relating to Plugging of Certain Inactive Wells; and Texas Natural Resources Code, §91.019, related to Standards for Construction, Operation, and Maintenance of Electrical Power Lines.

Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 89, Subchapter B-1; and Texas Natural Resources Code, §91.019, are affected by the repeal.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 89, Subchapter B-1; and Texas Natural Resources Code, §91.019.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052; Texas Natural Resources Code, Chapter 89, Subchapter B-1; and Texas Natural Resources Code, §91.019.

Issued in Austin, Texas, on August 24, 2010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004921
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: September 13, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 475-1295

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 100. GENERAL PROVISIONS

22 TAC §100.10

The State Board of Dental Examiners adopts an amendment to §100.10, relating to the Executive Director. The amendment is adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3922) and will not be republished.

The amended section was suggested by staff and proposed by the Board to authorize the Executive Director to accept voluntary surrender orders and to report to the Board any actions taken under this section.

No written comments were received regarding this amendment.

The amended section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004948
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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CHAPTER 103. DENTAL HYGIENE LICENSURE

22 TAC §103.5

The State Board of Dental Examiners adopts an amendment to §103.5, relating to Staggered Dental Hygiene Registrations. The amended section is adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3923) and will not be republished.

The amended section was proposed to reflect legislative changes implemented by Senate Bill 887, 81st Legislature, 2009 Regular Session. These changes, in part, require dental hygiene licensees to pay license fees within 30 days of initial licensure.

No written comments were received regarding the amendment.

Pursuant to Texas Occupations Code §262.102, the amendment was considered by the Dental Hygiene Advisory Committee. The committee had no comments on the proposal.

The amended section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

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Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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CHAPTER 107. DENTAL BOARD PROCEDURES

SUBCHAPTER A. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

22 TAC §§107.11, 107.15, 107.17, 107.21 - 107.25, 107.47, 107.48, 107.50, 107.54, 107.55, 107.63

The State Board of Dental Examiners adopts amendments to §107.11, relating to Definitions; amendments to §107.15, relating to Computation of Time; amendments to §107.17, relating to Service in Non-rulemaking Proceedings; amendments to §107.21, relating to Appearances Personally or by Representative; new §107.22, relating to Pleading; new §107.23, relating to Commencement of Formal Disciplinary Proceedings; new §107.24, relating to Respondent's Answer in a Disciplinary Matter; new §107.25, relating to Formal Proceedings; new §107.47, relating to Depositions; amendments to §107.48, relating to Subpoenas; amendments to §107.50, relating to Filing of Exceptions, Briefs, and Replies; amendments to §107.54, relating to Administrative Finality; amendments to §107.55, relating to Motions for Rehearing; and amendments to §107.63, relating to Informal Disposition and Alternative Dispute Resolution. The new and amended sections are adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3923) and will not be republished.

The new and amended sections were suggested by staff and proposed by the Board to update and clarify the State Board of Dental Examiners' procedural rules. The new and amended sections provide clarification and consistency in the agency's procedural process and provide licensees and registrants with a better understanding of necessary procedural requirements. In addition, the new wording more accurately reflects current statutory provisions and integrates applicable Administrative Procedure Act statutes, SOAH rules, and Texas Rules of Civil Procedure rules.

No written comments were received regarding the new and amended sections.

The new and amended sections are adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted sections affect Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004950
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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22 TAC §107.40

The State Board of Dental Examiners adopts new §107.40, relating to Reimbursement. The new section is adopted without

changes to the proposed text as published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4300) and will not be republished.

The new section was suggested by staff and proposed by the Board to create a clear, separate section related to reimbursement that links mileage reimbursement to revenue rulings issued by the Internal Revenue Service under the federal income tax regulations as announced by the Texas Comptroller.

No written comments were received regarding the new section.

The new section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004951
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 28, 2010
For further information, please call: (512) 463-6400

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22 TAC §107.59

The State Board of Dental Examiners adopts amendments to §107.59, relating to Ex Parte Consultations. The amended section is adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3930) and will not be republished.

The amended section was suggested by staff and proposed by the Board to bring the State Board of Dental Examiners' rules in congruence with the current language of Texas Government Code (APA) §2001.061.

The Board received one comment on the amended section from the Texas Dental Association (TDA). TDA expressed concern that there was a conflict between subsection (b) and subsection (c) and requested clarification on the changes.

The Board responds that the amendments reflect the language of the Ex Parte Consultation statute in Texas Government Code (APA) §2001.061. The Board recommends no changes be made.

The amendments are adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004952
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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SUBCHAPTER B. PROCEDURES FOR INVESTIGATING COMPLAINTS

22 TAC §107.102

The State Board of Dental Examiners adopts an amendment to §107.102, relating to Procedures for Investigating Complaints. The amended section is adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3931) and will not be republished.

The amendment was suggested by staff and proposed by the Board to match State Board of Dental Examiners' rule language with Dental Practice Act §255.005.

No written comments were received regarding the amended section.

The amended section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005064
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 15, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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SUBCHAPTER C. ADMINISTRATIVE PENALTIES

22 TAC §107.203

The State Board of Dental Examiners adopts new §107.203, relating to Aggravating and Mitigating Factors. The new section is adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3931) and will not be republished.

The new section was suggested by staff and proposed by the Board to specify what aggravating and mitigating factors may be taken into account when the Board considers formal disciplinary action against a licensee or registrant.

No written comments were received regarding the new section.

The new section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004953
Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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CHAPTER 108. PROFESSIONAL CONDUCT
SUBCHAPTER A. PROFESSIONAL RESPONSIBILITY

22 TAC §108.7

The State Board of Dental Examiners adopts amendments to §108.7, relating to Minimum Standard of Care, General. The amendments are adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3932) and will not be republished.

The amendments were proposed to provide an expanded list of standard of care requirements for licensees.

The Board received one comment from the Texas Dental Association (TDA) regarding the amendments. TDA states: "Amendments to §108.7 provide an expanded, though not exhaustive, list of standard of care violations. The effect is to allow the Board to determine what is, or is not, negligence or proper diligence in a dentist rendering care. This provides the Board a great deal of discretion to determine whether a dentist meets standard of care and thus expands the Board's authority to take action against a dentist without providing the dentist with specific direction regarding prohibited conduct."

The Board responds that the amended language reflects the statutory language in Dental Practice Act §263.002 and therefore does not broaden the Board's power but mirrors the statute. The Board recommends no change.

The amended section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

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Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Effective date: September 14, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 463-6400

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22 TAC §108.8

The State Board of Dental Examiners adopts amendments to §108.8, relating to Records of the Dentist. The amended section is adopted with changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3932) and will be republished.

The amendments were proposed to clarify records requirements and specifically spell out the implicit requirement of dentists to provide diagnostic quality x-rays and legible records in response to requests from patients and the State Board of Dental Examiners. The amendments do not substantively change the records requirements for dentists, but integrate language that better reflects current interpretation of the section.

The Board received one comment from the Texas Dental Association (TDA) regarding the amendments. TDA states: "The amended language in §108.8(e)(1) requires a dentist maintaining dental records to 'personally maintain' the records. As written, the quoted language 'personally maintain' appears to prohibit the dentist from delegating day-to-day record keeping duties such as data entry to staff members."

The Board responds that it did not intend to change the rule to prohibit dentists from delegating record keeping duties to auxiliaries. The Board will remove the term "personally" from the amended section.

The amended section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

§108.8. Records of the Dentist.

(a) The term dental records includes, but is not limited to: identification of the practitioner providing treatment; medical and dental history; limited physical examination; radiographs; dental and periodontal charting; diagnoses made; treatment plans; informed consent statements or confirmations; study models, casts, molds, and impressions, if applicable; cephalometric diagrams; narcotic drugs, dangerous drugs, controlled substances dispensed, administered or prescribed; anesthesia records; pathology and medical laboratory reports; progress and completion notes; materials used; dental laboratory prescriptions; billing and payment records; appointment records; consultations and recommended referrals; and post treatment recommendations.

(b) A Texas dental licensee practicing dentistry in Texas shall make, maintain, and keep adequate records of the diagnoses made and the treatments performed for and upon each dental patient for reference, identification, and protection of the patient and the dentist. Records shall be kept for a period of not less than five years. Records must include documentation of the following:

(1) Patients name;

(2) Date of visit;

(3) Reason for visit;

(4) Vital signs, including but not limited to blood pressure and heart rate when applicable in accordance with §108.7 of this title.

(5) If not recorded, an explanation why vital signs were not obtained.

(c) Further, records must include documentation of the following when services are rendered:

(1) Written review of medical history and limited review of medical exam;

(2) Findings and charting of clinical and radiographic oral examination;

(A) Documentation of radiographs taken and findings deduced from them, including radiograph films or digital reproductions.

(B) Use of radiographs, at a minimum, should be in accordance with ADA guidelines.

(3) Diagnosis(es);

(4) Treatment plan, recommendation, and options;

(5) Treatment provided;

(6) Medication and dosages given to patient;

(7) Complications;

(8) Written informed consent that meets the provisions of §108.7(6) of this title;

(9) The dispensing, administering, or prescribing of all medications to or for a dental patient shall be made a part of such patient's dental record. The entry in the patient's dental record shall be in addition to any record keeping requirements of the DPS or DEA prescription programs;

(10) All records pertaining to Controlled Substances and Dangerous Drugs shall be maintained in accordance with the Texas Controlled Substances Act;

(11) Confirmable identification of provider dentist, and confirmable identification of person making record entries if different from provider dentist;

(12) When any of the items in paragraphs (1) - (11) of this subsection are not indicated, the record must include an explanation why the item is not recorded.

(d) Dental records are the sole property of the dentist who performs the dental service. However, ownership of original dental records may be transferred as provided in this section. Copies of dental records shall be made available to a dental patient in accordance with this section.

(e) A dentist who leaves a location or practice, whether by retirement, sale, transfer, termination of employment or otherwise, shall maintain all dental records belonging to him or her, make a written transfer of records to the succeeding dentist, or make a written agreement for the maintenance of records.

(1) A dentist who continues to maintain the dental records belonging to him or her shall maintain the dental records in accordance with the laws of the State of Texas and this chapter.

(2) A dentist who enters into a written transfer of records agreement shall notify the State Board of Dental Examiners in writing within fifteen (15) days of a records transfer agreement. The notification shall include, at a minimum, the full names of the dentists involved in the agreement, include the locations involved in the agreement, and specifically identify what records are involved in the agreement. The agreement shall transfer ownership of the records. A transfer of records agreement may be made by agreement at any time in an employment or other working relationship between a dentist and another entity. Such transfer of records may apply to all or any part of the dental records generated in the course of the relationship, including future dental records.

(3) A dentist who enters into a records maintenance agreement shall notify the State Board of Dental Examiners within fifteen (15) days of such event. The notification shall include the full names of the dentists involved in the agreement, the locations involved in the agreement, and shall identify what records are involved in the agreement. A maintenance agreement shall not transfer ownership of the dental records, but shall require that the dental records be maintained in accordance with the laws of the State of Texas and the Rules of the State Board of Dental Examiners. The agreement shall require that the dentist(s) performing the dental service(s) recorded in the records have access to and control of the records for purposes of copying and recording. The dentist transferring the records in a records maintenance agreement shall maintain a copy of the records involved in the records maintenance agreement. Such an agreement may be made by written agreement by the parties at any time in an employment or other working relationship between a dentist and another entity. A records maintenance agreement may apply to all or any part of the dental records generated in the course of the relationship, including future dental records.

(f) Dental records shall be made available for inspection and reproduction on demand by the officers, agents, or employees of the State Board of Dental Examiners. The patient's privilege against disclosure does not apply to the Board in a disciplinary investigation or proceeding under the Dental Practice Act. Copies of dental records submitted to the Board on demand of the officers, agents, or employees of the Board shall be legible and all copies of dental x-rays shall be of diagnostic quality. Non-diagnostic quality copies of dental x-rays and illegible copies of patient records submitted to the Board shall not fulfill the requirements of this section.

(g) A dentist shall furnish copies of dental records to a patient who requests his or her dental records. At the patient's option, the copies may be submitted to the patient directly or to another Texas dental licensee who will provide treatment to the patient. Requested copies, including radiographs, shall be furnished within 30 days of the date of the request. The copies may be withheld until copying costs have been paid. Records shall not be withheld based on a past due account for dental care or treatment previously rendered to the patient. Copies of dental records submitted in accordance with a request under this section shall be legible and all copies of dental x-rays shall be of diagnostic quality. Non-diagnostic quality copies of dental x-rays shall not fulfill the requirements of this section.

(1) A dentist providing copies of patient dental records is entitled to a reasonable fee for copying which shall be no more than $25 for the first 20 pages and $0.15 per page for every copy thereafter.

(2) Fees for radiographs, which if copied by an radiograph duplicating service, may be equal to actual cost verified by invoice.

(3) Reasonable costs for radiographs duplicated by means other than by a radiograph duplicating service shall not exceed the following charges:

(A) a full mouth radiograph series: $15.00;

(B) a panoramic radiograph: $15.00;

(C) a lateral cephalometric radiograph: $15.00;

(D) a single extra-oral radiograph: $5.00;

(E) a single intra-oral radiograph: $5.00.

(4) State agencies and institutions will provide copies of dental health records to patients who request them following applicable agency rules and directives.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 463-6400

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22 TAC §108.9

The State Board of Dental Examiners adopts amendments to §108.9, relating to Dishonorable Conduct. The amended section is adopted with changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3932) and will be republished.

The amendments were suggested by staff and proposed by the Board to provide an expanded list of dishonorable conduct violations for licensees.

The Board received one comment from the Texas Dental Association (TDA) regarding these amendments. TDA states:

The amended language allows the Board to discipline a dentist regardless if there is a patient injury. For example, in (5) the Board could revoke a dentist's license if the dentist 'permits' another person with an expired license to work in their office.

Additionally, in (9) the amended language includes, 'failure to comply with Medicaid...laws.' Medicaid laws are extremely complicated and there are numerous violations for recordkeeping, failure to code properly, improper claims, and similar allegations which are minor in nature. This amended language may allow the Board to discipline a dentist anytime Medicaid alleges some violation. This would also apply to insurance claims and could conceivably be brought into play if an insurance company rejects a claim because the claim was improperly coded.

Finally, the amended language in (11) is very expansive. As written, the quoted language 'bring disgrace upon the licensee or the profession' is an encompassing provision that would require minimal proof for the Board to bring an allegation against a dentist.

The Board responds that the list of dishonorable conduct violations in the amendments to §108.9 were compiled from violations previously scattered throughout the Dental Practice Act and the State Board of Dental Examiners' rules. The violations do not represent a substantive change in disciplinary authority or policy by the Board, but simply represent an assemblage of previously existing requirements under one rule. For example, the language from §108.9(5) comes directly from Dental Practice Act §263.002(a)(8).

Likewise, dentists are already required to comply with Medicaid and insurance laws. Dental Practice Act §263.002(10) and (14) permits the Board to discipline the licenses of dentists who fail to comply with the laws relating to the regulation of dentists and dental hygienists and of those who provide dental care in a manner that violates laws regulating insurance or any other reimbursement plan (including Medicaid). As with any disciplinary action, the Board cannot discipline a licensee based solely on allegations. Disciplinary action will continue to be pursued based on evidence of violations.

In addition, the language quoted in §108.9(11) is substantively identical to the language currently found in §108.9(6). This amendment does not represent a substantive change in the dishonorable conduct section, but merely a relocation of previously existing language.

Finally, the Board's disciplinary authority is not invoked only in cases with actual patient injury or harm. The Board reviews conduct that could cause potential patient harm and recommends remediation that could possibly preempt actual patient harm.

The Board recommends no change.

The Board does note that §108.9(11) was published in the *Texas Register* with a minor typographical error which has been corrected.

The amended section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

§108.9. Dishonorable Conduct.

The dishonorable conduct section is intended to protect the public from dangerous, unethical, and illegal conduct of licensees. The purpose of this section is to identify unprofessional or dishonorable behaviors of a licensee which the Board believes are likely to pose a threat to the public. Actual injury to a patient need not be established for a licensee to be in violation of this section. Behavior constituting dishonorable conduct includes, but is not limited to:

(1) Criminal conduct--including but not limited to conviction of a misdemeanor involving fraud or a felony under federal law or the law of any state as outlined in Chapter 101 of this title.

(2) Deception or misrepresentation--engages in deception or misrepresentation:

(A) in soliciting or obtaining patronage; or

(B) in obtaining a fee.

(3) Fraud in obtaining a license--obtains a license by fraud or misrepresentation or participates in a conspiracy to procure a license, registration, or certification for an unqualified person.

(4) Misconduct involving drugs or alcohol--actions or conduct that include, but are not limited to:

(A) providing dental services to a patient while the licensee is impaired through the use of drugs, narcotics, or alcohol;

(B) addicted to or habitually intemperate in the use of alcoholic beverages or drugs;

(C) improperly obtained, possessed, or used habit-forming drugs or narcotics including self-prescription of drugs;

(D) grossly over prescribes, dispenses, or administers narcotic drugs, dangerous drugs, or controlled substances;

(E) prescribes, dispenses, or administers narcotic drugs, dangerous drugs, or controlled substances to or for a person who is not his or her dental patient; or

(F) prescribes, dispenses, or administers narcotic drugs, dangerous drugs, or controlled substances to a person for a non-dental purpose, whether or not the person is a dental patient.

(5) Assisting another in engaging in the unauthorized practice of dentistry or dental hygiene--holds a dental license and employs, permits, or has employed or permitted a person not licensed to practice dentistry to practice dentistry in an office of the dentist that is under the dentist's control or management.

(6) Failure to comply with applicable laws, rules, regulations, and orders--violates or refuses to comply with a law relating to the regulation of dentists, dental hygienists, or dental assistants; fails to cooperate with a Board investigation; or fails to comply with the terms of a Board Order.

(7) Inability to practice safely--is physically or mentally incapable of practicing in a manner that is safe for the person's dental patients.

(8) Discipline of a licensee by another state board--holds a license or certificate to practice dentistry or dental hygiene in another state and the examining board of that state:

(A) reprimands the person;

(B) suspends or revokes the person's license or certificate or places the person on probation; or

(C) imposes another restriction on the person's practice.

(9) Failure to comply with Medicaid, insurance, or other regulatory laws--knowingly provides or agrees to provide dental care in a manner that violates a federal or state law that:

(A) regulates a plan to provide, arrange for, pay for, or reimburse any part of the cost of dental care services; or

(B) regulates the business of insurance.

(10) Improper delegation--improperly delegates any task to any individual who is not permitted to perform the task by law, this chapter, or practice restrictions imposed by Board Order.

(11) Unprofessional conduct--engages in conduct that has become established through professional experience as likely to disgrace, degrade, or bring discredit upon the licensee or the dental profession.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Director
State Board of Dental Examiners
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CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

22 TAC §114.10

The State Board of Dental Examiners adopts new §114.10, relating to Dishonorable Conduct. The new section is adopted with changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3934) and will be republished.

The new section was suggested by staff and proposed by the Board to clarify the conduct requirements for dental assistants.

The Board received one comment from the Texas Dental Association (TDA) regarding the new section. TDA states: "These new rules authorize the Board to discipline dental assistants and dental hygienists even if patient harm is not involved. While we agree with the SBDE's efforts to help allied personnel understand their professional requirements, we are concerned that the new rule language may expand the basis on which the Board may impose discipline without providing the license holder specific guidance on the type of prohibited conduct."

The Board responds that §108.9, relating to Dishonorable Conduct, prohibits all licensees and registrants from engaging in conduct prohibited by this section. However, it can be confusing for dental assistants to know to look for requirements in a chapter not specifically related to their registration. By listing categories of conduct in a section tailored to the duties and conduct of registered dental assistants (RDAs), the Board believes that RDAs will be able to locate and understand the requirements easier. Finally, Board rules and the Dental Practice Act do not require the presence of patient harm when taking action against a license or registration. The Board reviews actions and conduct for the potential of patient harm and attempts to intercede prior to actual patient harm. The Board recommends no change.

The section as proposed and published in the *Texas Register* was potentially unclear in a few paragraphs regarding licenses versus registration. The language in the section has been corrected to clearly reflect that the language refers to licenses and registrations. These changes are non-substantive.

The new section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

§114.10. Dishonorable Conduct.

The dishonorable conduct section is intended to protect the public from dangerous, unethical, and illegal conduct of licensees and registrants. The purpose of this section is to identify unprofessional or dishonorable behaviors of a dental assistant which the Board believes are likely to pose a threat to the public. Actual injury to a patient need not be

established for a dental assistant to be in violation of this section. Behavior constituting dishonorable conduct includes, but is not limited to:

(1) Criminal conduct--including but not limited to conviction of a misdemeanor involving fraud or a felony under federal law or the law of any state as outlined in Chapter 101 of this title.

(2) Deception or misrepresentation--engages in deception or misrepresentation:

(A) in soliciting or obtaining patronage; or

(B) in obtaining a fee.

(3) Fraud in obtaining a license, registration, or certification--obtains a registration or certification by fraud or misrepresentation or participates in a conspiracy to procure a license, registration, or certification for an unqualified person.

(4) Misconduct involving drugs or alcohol--actions or conduct that include, but are not limited to:

(A) providing dental services to a patient while the dental assistant is impaired through the use of drugs, narcotics, or alcohol;

(B) addicted to or habitually intemperate in the use of alcoholic beverages or drugs; or

(C) improperly obtained, possessed, or used habit-forming drugs or narcotics.

(5) Failure to comply with applicable laws, rules, regulations, and orders--violates or refuses to comply with a law relating to the regulation of dentists, dental hygienists, or dental assistants; fails to cooperate with a Board investigation; or fails to comply with the terms of a Board Order.

(6) Inability to practice safely--is physically or mentally incapable of practicing in a manner that is safe for the person's dental patients.

(7) Discipline of a licensee or registrant by another state board--holds a license, registration, or certificate to practice dentistry, dental hygiene, or dental assisting in another state and the examining board of that state:

(A) reprimands the person;

(B) suspends or revokes the person's license, registration, or certificate or places the person on probation; or

(C) imposes another restriction on the person's practice.

(8) Unprofessional conduct--engages in conduct that has become established through professional experience as likely to disgrace, degrade, or bring discredit upon the licensee/registrant or the dental profession.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL HYGIENE

22 TAC §115.9

The State Board of Dental Examiners adopts new §115.9, relating to Dishonorable Conduct. The new section is adopted without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3935) and will not be republished.

The new section was proposed to clarify the conduct requirements for dental hygienists.

The Board received one comment from the Texas Dental Association (TDA) regarding the new section. TDA states: "These new rules authorize the Board to discipline dental assistants and dental hygienists even if patient harm is not involved. While we agree with the SBDE's efforts to help allied personnel understand their professional requirements, we are concerned that the new rule language may expand the basis on which the Board may impose discipline without providing the license holder specific guidance on the type of prohibited conduct."

The Board responds that §108.9, relating to Dishonorable Conduct, as well as Dental Practice Act §263.002 prohibit all licensees from engaging in conduct prohibited by this section. However, it can be confusing for dental hygienists to know to look for requirements in a chapter not specifically related to their licenses. By listing categories of conduct in a section tailored to the duties and conduct of dental hygienists, the Board believes that dental hygienists will be able to locate and understand the requirements easier. Finally, Board rules and the Dental Practice Act do not require the presence of patient harm when taking action against a license or registration. The Board reviews actions and conduct for the potential of patient harm and attempts to intercede prior to actual patient harm. The Board recommends no change.

Pursuant to Texas Occupations Code §262.102, the amendment was considered by the Dental Hygiene Advisory Committee. The committee had no comments on the proposal.

The new section is adopted under Texas Government Code §§2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The adopted section affects Texas Occupations Code, Title 3, Subtitle D, and Texas Administrative Code, Title 22, Part 5.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 9. TEXAS MEDICAL BOARD

CHAPTER 161. GENERAL PROVISIONS

22 TAC §161.5

The Texas Medical Board (Board) adopts amendments to §161.5, concerning Meetings, without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6172) and will not be republished.

The amendment to §161.5 provides that adoption of committee minutes are to be approved by the full Board rather than by the individual committees.

No comments were received regarding adoption of the amendments.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §152.009, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mari Robinson, J.D.
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Texas Medical Board
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CHAPTER 163. LICENSURE

22 TAC §163.6

The Texas Medical Board (Board) adopts amendments to §163.6, concerning Examinations Accepted for Licensure, with changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6173).

The amendment to §163.6 clarifies that if an applicant takes multiple types of licensure examinations, attempts at comparable sections shall be combined to determine eligibility for licensure. Language is currently under a different subsection, and the language is being moved to be cleared on its application.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §53.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §153.001 and §155.056, Texas Occupations Code.

§163.6. Examinations Accepted for Licensure.

(a) Licensing Examinations Accepted by the Board for Licensure. The following examinations are acceptable for licensure:

(1) United States Medical Licensing Examination (USMLE), or its successor, with a score of 75 or better, or a passing grade if applicable, on each step;

(2) COMLEX-USA, or its successor, with a score of 75 or better, or a passing grade if applicable, on each step;

(3) Federation Licensing Examination (FLEX), on or after July 1, 1985, passage of both components with a score of 75 or better on each component;

(4) Federation Licensing Examination (FLEX), before July 1, 1985, with a FLEX weighted average of 75 or better in one sitting;

(5) National Board of Medical Examiners Examination (NBME) or its successor;

(6) National Board of Osteopathic Medical Examiners Examination (NBOME) or its successor;

(7) Medical Council of Canada Examination (LMCC) or its successor;

(8) State board licensing examination, passed before January 1, 1977, (with the exception of Virgin Islands, Guam, Tennessee Osteopathic Board or Puerto Rico then the exams must be passed before July 1, 1963); or

(9) One of the following examination combinations with a score of 75 or better on each part, level, component, or step;

(A) FLEX I plus USMLE 3;

(B) USMLE 1 and USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(C) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus NBME III or USMLE 3;

(D) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(E) The NBOME Part I or COMLEX Level I and NBOME Part II or COMLEX Level II and NBOME Part III or COMLEX Level III.

(b) Examination Attempt Limit.

(1) An applicant must pass each part of an examination listed in subsection (a) of this section within three attempts. An applicant who attempts more than one type of examination must pass each part of at least one examination and shall not be allowed to combine parts of different types of examination.

(2) Notwithstanding paragraph (1) of this subsection, an applicant who, on September 1, 2005, held a Texas physician-in-training permit issued under §155.105 of the Act or had an application for that permit pending before the board must pass each part of the examination within three attempts, except that, if the applicant has passed all but one part of the examination within three attempts, the applicant may take the remaining part of the examination one additional time. However, an applicant is considered to have satisfied the requirements of this subsection if the applicant:

(A) passed all but one part of the examination approved by the board within three attempts and passed the remaining part of the examination within six attempts;

(B) is specialty board certified by a specialty board that:

(i) is a member of the American Board of Medical Specialties; or

(ii) is approved by the American Osteopathic Association; and

(iii) has completed in this state an additional two years of postgraduate medical training approved by the board.

(3) The limitation on examination attempts by an applicant under paragraph (1) of this subsection does not apply to an applicant who:

(A) is licensed and in good standing as a physician in another state;

(B) has been licensed for at least five years;

(C) does not hold a medical license in the other state that has any restrictions, disciplinary orders, or probation; and

(D) passed all but one part of the examination approved by the board within three attempts and:

(i) passed the remaining part of the examination within one additional attempt; or

(ii) passed the remaining part of the examination within six attempts if the applicant:

(I) is specialty board certified by a specialty board that:

(-a-) is a member of the American Board of Medical Specialties; or

(-b-) is approved by the American Osteopathic Association; and

(II) has completed in this state an additional two years of postgraduate medical training approved by the board.

(4) Attempts at a comparable part of a different type of examination shall be counted against the three attempt limit.

(c) Limit on Time to Complete Examination.

(1) An applicant must pass all parts of an examination listed in subsections (a)(1), (2), (4), (5), or (6) of this section within seven years; or,

(2) If the applicant is a graduate of a program designed to lead to both a doctor of philosophy degree and a doctor of medicine degree or doctor of osteopathy degree, the applicant may qualify by passing each part of an examination listed in subsections (a)(1), (2), (4), (5), or (6) of this section not later than the second anniversary of the date the applicant completed the required graduate medical training.

(d) The time frame to pass each part of the examination described by subsection (c)(1) of this section is extended to 10 years and the anniversary date to pass each part of the examination described by subsection (c)(2) of this section is extended to the 10th anniversary if the applicant:

(1) is specialty board certified by a specialty board that:

(A) is a member of the American Board of Medical Specialties; or

(B) is a member of the Bureau of Osteopathic Specialists; or

(2) has been issued a faculty temporary license, as prescribed by board rule, and has practiced under such a license for a minimum of 12 months and, at the conclusion of the 12-month period, has been recommended to the board by the chief administrative officer and the president of the institution in which the applicant practiced under the faculty temporary license.

(e) Texas Medical Jurisprudence Examination (JP Exam).

(1) In this chapter, when applicants are required to pass the JP exam, applicants must pass the JP exam with a score of 75 or better within three attempts, unless the Board allows an additional attempt based upon a showing of good cause. An applicant who is unable to pass the JP exam within three attempts must appear before the Licensure Committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.

(2) An examinee shall not be permitted to bring medical books, compendia, notes, medical journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(3) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action.

(4) A person who has passed the JP Exam shall not be required to retake the Exam for another or similar license, except as a specific requirement of the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 165. MEDICAL RECORDS

22 TAC §165.1

The Texas Medical Board (Board) adopts amendments to §165.1, concerning Medical Records, with changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6174).

The amendment to §165.1 provides that physicians who receive medical records from other practitioners in relation to the treatment of a specific patient, must only keep those records that are salient to the patient's treatment.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern

its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

§165.1. Medical Records.

(a) Contents of Medical Record. Each licensed physician of the board shall maintain an adequate medical record for each patient that is complete, contemporaneous and legible. For purposes of this section, an "adequate medical record" should meet the following standards:

(1) The documentation of each patient encounter should include:

(A) reason for the encounter and relevant history, physical examination findings and prior diagnostic test results;

(B) an assessment, clinical impression, or diagnosis;

(C) plan for care (including discharge plan if appropriate); and

(D) the date and legible identity of the observer.

(2) Past and present diagnoses should be accessible to the treating and/or consulting physician.

(3) The rationale for and results of diagnostic and other ancillary services should be included in the medical record.

(4) The patient's progress, including response to treatment, change in diagnosis, and patient's non-compliance should be documented.

(5) Relevant risk factors should be identified.

(6) The written plan for care should include when appropriate:

(A) treatments and medications (prescriptions and samples) specifying amount, frequency, number of refills, and dosage;

(B) any referrals and consultations;

(C) patient/family education; and,

(D) specific instructions for follow up.

(7) any written consents for treatment or surgery requested from the patient/family by the physician.

(8) Billing codes, including CPT and ICD-9-CM codes, reported on health insurance claim forms or billing statements should be supported by the documentation in the medical record.

(9) Any amendment, supplementation, change, or correction in a medical record not made contemporaneously with the act or observation shall be noted by indicating the time and date of the amendment, supplementation, change, or correction, and clearly indicating that there has been an amendment, supplementation, change, or correction.

(10) Salient records received from another physician or health care provider involved in the care or treatment of the patient shall be maintained as part of the patient's medical records.

(11) The board acknowledges that the nature and amount of physician work and documentation varies by type of services, place of service and the patient's status. Paragraphs (1) - (11) of this subsection may be modified to account for these variable circumstances in providing medical care.

(b) Maintenance of Medical Records.

(1) A licensed physician shall maintain adequate medical records of a patient for a minimum of seven years from the anniversary date of the date of last treatment by the physician.

(2) If a patient was younger than 18 years of age when last treated by the physician, the medical records of the patient shall be maintained by the physician until the patient reaches age 21 or for seven years from the date of last treatment, whichever is longer.

(3) A physician may destroy medical records that relate to any civil, criminal or administrative proceeding only if the physician knows the proceeding has been finally resolved.

(4) Physicians shall retain medical records for such longer length of time than that imposed herein when mandated by other federal or state statute or regulation.

(5) Physicians may transfer ownership of records to another licensed physician or group of physicians only if the physician provides notice consistent with §165.5 of this chapter (relating to Transfer and Disposal of Medical Records) and the physician who assumes ownership of the records maintains the records consistent with this chapter.

(6) Medical records may be owned by a physician's employer, to include group practices, professional associations, and nonprofit health organizations, provided records are maintained by these entities consistent with this chapter.

(7) Destruction of medical records shall be done in a manner that ensures continued confidentiality.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 172. TEMPORARY AND LIMITED LICENSES

The Texas Medical Board (Board) adopts amendments to §§172.2, 172.3, 172.5, and 172.16 and new §172.17, concerning Temporary and Limited Licenses. Section 172.2 is adopted with changes, and the remaining sections are adopted without changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6424) and will not be republished.

The amendment to §172.2, concerning Construction and Definitions, adds definitions for controlled substances and dangerous drugs.

The amendment to §172.3, concerning Distinguished Professors Temporary License, clarifies that applicants for a distinguished professor temporary license must complete all provisions of an application for a full license and updates the name of the American Osteopathic Association Commission on Osteopathic College Accreditation.

The amendment to §172.5, concerning Visiting Physician Temporary Permit (VPTP), creates a category for visiting physician temporary permits for those who are enrolled in the Texas A&M KSTAR program.

The amendment to §172.16, concerning Provisional Licenses for Medically Underserved Areas, amends language to be consistent with Texas Occupations Code §155.101.

New §172.17, concerning Limited License for Practice of Administrative Medicine, establishes the criteria for obtaining a limited license for the practice of administrative medicine. The creation of this type of license permits applicants to practice administrative medicine under this license, rather than applying for full licensure and having their practice limited to administrative medicine under a disciplinary order even though the applicants only issue is not actively practicing clinical medicine in one of the two years prior to the date of application for licensure.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

22 TAC §172.2

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §§153.001, 155.009, and 155.101, Texas Occupations Code.

§172.2. Construction and Definitions.

(a) Unless otherwise indicated, temporary license holders under this chapter shall be subject to the duties, limitations, disciplinary actions, rehabilitation order provisions, and procedures applicable to licensees in the Medical Practice Act and board rules. Temporary license holders under this chapter shall also be subject to the limitations and restrictions elaborated in this chapter.

(b) Temporary and limited license holders under this chapter shall cooperate with the board and board staff involved in investigation, review, or monitoring associated with the license holder's practice of medicine. Such cooperation shall include, but not be limited to, written response to the board or board staff written inquiry within 14 days of receipt of such inquiry.

(c) In accordance with the Medical Practice Act, the board shall retain jurisdiction to discipline a temporary or limited license holder whose license has been terminated, canceled, and/or expired if the license holder violated the Medical Practice Act or board rules during the time the license was valid.

(d) The issuance of a temporary or limited license shall not be construed to obligate the board to issue subsequent permits or licenses. The board reserves the right to investigate, deny a permit, temporary or limited license, or full licensure, and/or discipline a physician regardless of when the information was received by the board.

(e) Nothing in this chapter shall be construed to prevent the board from issuing temporary or limited licenses to those physicians awaiting full licensure pursuant to §172.11 of this title (relating to Temporary Licensure--Regular) or to those licensees who qualify for CME temporary licenses pursuant to §166.2(k) of this title (relating to CME temporary licenses).

(f) All applicants for temporary or limited licenses whose applications have been filed with the board in excess of one year will be considered expired.

(1) If the Executive Director determines that the applicant clearly meets all requirements for the temporary or limited license, the Executive Director or a person designated by the Executive Director, may issue a license to the applicant, to be effective on the date of issuance without formal board approval, as authorized by §155.002(b) of the Act.

(2) If the Executive Director determines that the applicant does not clearly meet all requirements for a temporary or limited license, a license may be issued only upon action by the board following a recommendation by the Licensure Committee, in accordance with §155.007 of the Act (relating to Application Process) and §187.13 of this title (relating to Informal Board Proceedings Relating to Licensure Eligibility).

(3) If the Executive Director determines that the applicant is ineligible for a temporary or limited for one or more reasons that are not subject to exception by statute or rule, the applicant may appeal that decision to the Licensure Committee before completing other licensure requirements for a determination by the Committee solely regarding issues raised by the determination of ineligibility. If the Committee overrules the determination of the Executive Director, the applicant may then provide additional information to complete the application, which must be analyzed by board staff and approved before a license may be issued.

(g) In addition to other definitions that may apply to licensure, the following words and terms, when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

(1) Act that is part of patient care service--Any diagnosis, assessment, or treatment including the taking of diagnostic imaging studies as well as the preparation of pathological material for examination.

(2) Controlled substance--A substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or Penalty Groups 1, 1-A, or 2 through 4 as described under the Texas Health and Safety Code, Chapter 481 (Texas Controlled Substances Act). The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance.

(3) Dangerous drug--A device or a drug that is unsafe for self medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of the Texas Health and Safety Code, Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend: "Caution: federal law prohibits dispensing without prescription."

(4) Episodic consultation--Consultation on an irregular or infrequent basis involving no more than 24 patients of a physician's diagnostic or therapeutic practice per calendar year. Multiple consultations may be performed for one or more patients up to 24 patients per calendar year.

(5) Informal consultation--Consultation performed outside the context of a contractual relationship and on an irregular or infrequent basis without the expectation of or exchange of direct or indirect compensation.

(6) Patient care service initiated in this state--Any act constituting the practice of medicine as defined in this chapter in which the patient is physically located in Texas at the time of diagnosis, treatment, or testing.

(7) Person--An individual unless otherwise expressly made applicable to a partnership, association, or corporation.

(8) Practice of medicine--A person shall be considered to be practicing medicine under any of the following circumstances listed in subparagraphs (A) - (D) of this paragraph. This definition does not negate the responsibility of applicants to demonstrate engagement in the active practice of medicine as set forth in §163.11 of this title (relating to Active Practice of Medicine).

(A) the person publicly professes to be a physician or surgeon and diagnoses, treats, or offers to treat any mental or physical disease or disorder, or any physical deformity or injury by any system or method or to effect cures thereof;

(B) the person diagnoses, treats or offers to treat any mental or physical disease or disorder, or any physical deformity or injury by any system or method and to effect cures thereof and charges therefor, directly or indirectly, money or other compensation;

(C) the person exercises medical judgment, renders an opinion, or gives advice concerning the diagnosis or treatment of a patient, or makes any determination regarding the appropriate or necessary medical response to a particular patient's medical condition that affects the medical care of the patient; or

(D) the person is physically located in another jurisdiction, other than the state of Texas, and through any medium performs an act that is part of patient care service initiated in this state that would affect the diagnosis or treatment of the patient.

(9) State--Any state, territory, or insular possession of the United States and the District of Columbia.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: September 19, 2010
Proposal publication date: July 23, 2010
For further information, please call: (512) 305-7016

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SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.3, §172.5

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §§153.001, 155.009, and 155.101, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. LIMITED LICENSES

22 TAC §172.16, §172.17

The amendment and new rule are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment and new rule are also authorized by §§153.001, 155.009, and 155.101, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 177. CERTIFICATION OF NON-PROFIT HEALTH ORGANIZATIONS

22 TAC §177.13

The Texas Medical Board (Board) adopts amendments to §177.13, concerning Complaint Procedure Notification, without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6178) and will not be republished.

The amendments to §177.13 updates the name of the Texas Medical Board as used in this chapter.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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CHAPTER 179. INVESTIGATIONS

22 TAC §179.4

The Texas Medical Board (Board) adopts amendments to §179.4, concerning Requests for Information and Records from Physicians, without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6179) and will not be republished.

The amendments to §179.4 clarifies that this section applies in all respects to licensure applicants.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also authorized by §153.001 and §154.056, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 180. TEXAS PHYSICIAN HEALTH PROGRAM AND REHABILITATION ORDERS

22 TAC §§180.2 - 180.4

The Texas Medical Board (Board) adopts amendments to §§180.2 - 180.4, concerning Texas Physician Health Program and Rehabilitation Orders, without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6180) and will not be republished.

The amendment to §180.2, concerning Definitions, adds that the Texas Physician Health and Rehabilitation Committee shall also be referred to as the TXPHP Advisory Committee.

The amendment to §180.3, concerning Texas Physician Health Program (PHP), amends language to be consistent with the amendment to §180.2.

The amendment to §180.4, concerning Operation of Program, provides that the drug vendor used by the PHP must be approved by the Texas Medical Board, and establishes standards for processing referrals, requiring evaluations, settings terms for agreements with participants, and facilitating interventions.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §153.001 and §167.006, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §§185.4, 185.7, 185.16, 185.22, 185.27

The Texas Medical Board (Board) adopts amendments to §§185.4, 185.7, 185.16, 185.22, and new §185.27, concerning Physician Assistants, without changes to the proposed text as published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4301) and will not be republished.

The amendment to §185.4, relating to Procedural Rules for Licensure Applicants, deletes inaccurate language and provides clarifying language that the rule applies to determinations on active practice.

The amendment to §185.7, relating to Temporary License, provides that the PA Board may revoke a temporary license when necessary.

The amendment to §185.16, relating to Employment Guidelines, deletes language based on recent statutory changes, and clarifies that a physician may supervise more than five physician assistants if granted a waiver by the Texas Medical Board.

The amendment to §185.22, relating to Impaired Physician Assistants, establishes requirements for probable cause hearings relating to physical or mental impairment examinations, and applies Chapter 180 to physician assistants in relation to rehabilitation orders and the Texas Physician Health Program.

New §185.27, relating to Duty to Report Certain Conduct to the Board, sets out requirements for physician assistants to report certain events to the PA Board within 30 days of their occurrence.

No comments were received regarding adoption of the amendments and new rule.

The amendments and new rule are adopted under the authority of the Texas Occupations Code Annotated, §204.102, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 187. PROCEDURAL RULES

The Texas Medical Board (Board) adopts amendments to §187.27, concerning Written Answers in SOAH Proceedings and Default Orders, and §187.81, concerning Reports on Imposition of Administrative Penalty, without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6182) and will not be republished.

The amendment to §187.27 corrects an incorrect citation.

The amendment to §187.81 requires that disciplinary orders that impose administrative penalties related to the delivery of health care services must be reported to the National Practitioner Data Bank.

No comments were received regarding adoption of the amendments.

SUBCHAPTER C. FORMAL BOARD PROCEEDINGS AT SOAH

22 TAC §187.27

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. IMPOSITION OF ADMINISTRATIVE PENALTY

22 TAC §187.81

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

The Texas State Board of Pharmacy adopts amendments to §281.8, concerning Grounds for Discipline for a Pharmacy License, the repeal of §281.11, concerning Rules Governing Cooperating Practitioners, new §281.11, concerning Criminal History Evaluation Letter, and new §281.12, concerning Rules Governing Cooperating Practitioners. The amendments, new rules, and repeal are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5436).

The amendments to §281.8 correct references to the Texas Pharmacy Act. The repeal of §281.11 provides for a more organized subchapter and the rule is adopted as new §281.12. New §281.11 implements House Bill 963, which amended Chapter 53 of the Occupations Code requiring all regulatory agencies to conduct a preliminary evaluation of a person's eligibility to be licensed and outlines the requirements for individuals seeking to obtain a criminal history evaluation letter regarding eligibility for a license or registration.

No comments were received.

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §§281.8, 281.11, 281.12

The amendments and new rules are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and Chapter 53 of the Texas Occupations Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules

for the proper administration and enforcement of the Act. The Board interprets Chapter 53 as authorizing the agency to issue a criminal history evaluation letter and to charge a fee sufficient to cover the costs associated with the criminal history evaluation.

The statutes affected by this amendment, and new rules: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code and Chapter 53, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8037

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22 TAC §281.11

The repeal is adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and Chapter 53 of the Texas Occupations Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets Chapter 53 as authorizing the agency to issue a criminal history evaluation letter and to charge a fee sufficient to cover the costs associated with the criminal history evaluation.

The statutes affected by this repeal: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code and Chapter 53, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. GENERAL PROCEDURES IN A CONTESTED CASE

22 TAC §281.22

The Texas State Board of Pharmacy adopts amendments to §281.22, concerning Informal Disposition of a Contested Case. The amendments are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5438).

The adopted amendments correct a reference to §281.25 which was previously repealed and update the reference to §281.30.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §281.64, §281.66

The Texas State Board of Pharmacy adopts amendments to §281.64, concerning Sanctions for Criminal Offenses, and §281.66, concerning Application for Reissuance or Removal of Restrictions of a License or Registration. The amendments are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5438).

The adopted amendments clarify disciplinary guidelines to reflect the regulatory polices and goals of the Board to protect the public health and safety, and include a fee for individuals applying for reinstatement of their license or registration.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.6, §291.9

The Texas State Board of Pharmacy adopts amendments to §291.6, concerning Pharmacy License Fees, and §291.9, concerning Prescription Pick Up Locations. The amendments to §291.6 are adopted with changes to the proposed text changing the effective date of the fee decrease from October 1, 2011, to December 1, 2011. The amendments to §291.9 are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5440).

The adopted amendments to §291.6 decrease pharmacy registration fees based on expected expenses. The adopted amendments to §291.9 clarify the requirements for prescription pick up locations based on new rule §291.155 adopted in this issue of the *Texas Register.*

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.6. Pharmacy License Fees.

(a) Initial License Fee.

(1) Prior to December 1, 2011, the fee for an initial license shall be $452 for a two year registration and for processing the application and issuance of the pharmacy license as authorized by the Act §554.006. Effective December 1, 2011, the fee for an initial license shall be $365 for a two year registration and for processing the application and issuance of the pharmacy license as authorized by the Act §554.006.

(2) In addition, the following fees shall be collected:

(A) prior to December 1, 2011, $15 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act §564.051; effective December 1, 2011, $13 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act §564.051;

(B) $10 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(C) $5 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(3) New pharmacy licenses shall be assigned an expiration date and initial registration fee shall be prorated based on the assigned expiration date.

(b) Biennial License Renewal. The Texas State Board of Pharmacy shall require biennial renewal of all pharmacy licenses provided under the Act §561.002.

(c) Renewal Fee.

(1) Prior to December 1, 2011, the fee for biennial renewal of a pharmacy license shall be $452 for processing the application and issuance of the pharmacy license as authorized by the Act §554.006. Effective December 1, 2011, the fee for biennial renewal of a pharmacy license shall be $365 for processing the application and issuance of the pharmacy license as authorized by the Act §554.006.

(2) In addition, the following fees shall be collected:

(A) prior to December 1, 2011, $15 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act §564.051; effective December 1, 2011, $13 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act §564.051;

(B) $10 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(C) $2 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(d) Duplicate or Amended Certificates. The fee for issuance of an amended pharmacy license renewal certificate shall be $20.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8037

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SUBCHAPTER C. NUCLEAR PHARMACY (CLASS B)

22 TAC §§291.51 - 291.55

The Texas State Board of Pharmacy adopts amendments to §291.51, concerning Purpose, §291.52, concerning Definitions, §291.53, concerning Personnel, §291.54, concerning Operational Standards, and §291.55, concerning Records. The amendments are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5441).

The amendments incorporate recommendations made by the Task Force on Nuclear Pharmacy (Class B) and incorporate staff recommendations to update/correct references to other rules and update the rules to be consistent with other sections of the rules.

No comments were received.

The amendments are adopted under §551.002, and §554.051, of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.121

The Texas State Board of Pharmacy adopts amendments to §291.121, concerning Remote Pharmacy Services. The amendments are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5458).

The adopted amendments allow more than one pharmacy to supply emergency medication kits to an institution when one pharmacy can not meet the emergency medication needs of the residents and correct references to other rules.

No comments were received.

The amendments are adopted under §§551.002, 554.051, and 562.108 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.108 as authorizing the agency to adopt rules relating to emergency medication kits.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 305-8037

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SUBCHAPTER H. OTHER CLASSES OF PHARMACY

22 TAC §291.151

The Texas State Board of Pharmacy adopts amendments to §291.151, concerning Pharmacies Located in a Freestanding Emergency Medical Care Center (Class F). The amendments are adopted without changes to the proposed text as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5462).

The adopted amendments clarify the licensing requirements for hospitals exempt from licensing requirements under Chapter 254, Health and Safety Code, operating freestanding emergency medical care centers.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this amendment: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8037

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22 TAC §291.153

The Texas State Board of Pharmacy adopts new §291.153, concerning Central Prescription Drug or Medication Order Processing Pharmacy (Class G). New §291.153 is adopted with changes to the proposed text based on comments received.

The adopted new rule creates a new class of pharmacy, Class G, to allow for central prescription or medication order processing.

The National Association of Chain Drug stores commented that the security requirements should be revised to accommodate various security systems since the pharmacy will not be storing prescription drugs. The Board agrees with this comment

and changes the security requirements for the pharmacy since the pharmacy will be storing records and not drugs. Express Scripts commented that the rules allow pharmacists employed by Class E pharmacies to process prescriptions remotely. The Board agrees with the comment but because the changes are substantive the Board will propose the change at their next meeting. H.E.B. Pharmacy suggested that the rule regarding ratio allow 2 pharmacy technician trainees and 4 pharmacy technicians. The Board agrees to consider the comment and will propose the change at their next meeting.

The new rule is adopted under §§551.002, 554.051, and 560.053 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §560.053 as authorizing the agency to adopt rules establishing additional pharmacy classifications.

The statutes affected by this new rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.153. Central Prescription Drug or Medication Order Processing Pharmacy (Class G).

(a) Purpose.

(1) The purpose of this section is to provide standards for a centralized prescription drug or medication order processing pharmacy.

(2) Any facility established for the primary purpose of processing prescription drug or medication drug orders shall be licensed as a Class G pharmacy under the Act. A Class G pharmacy shall not store bulk drugs, or dispense a prescription drug order. Nothing in this subsection shall prohibit an individual pharmacist employee who is licensed in Texas from remotely accessing the pharmacy's electronic data base from a location other than a licensed pharmacy in order to process prescription or medication drug orders, provided the pharmacy establishes controls to protect the privacy and security of confidential records, and the Texas-licensed pharmacist does not engage in the receiving of written prescription or medication orders or the maintenance of prescription or medication drug orders at the non-licensed remote location.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. Any term not defined in this section shall have the definition set out in the Act.

(1) Centralized prescription drug or medication order processing--The processing of a prescription drug or medication orders by a Class G pharmacy on behalf of another pharmacy, a health care provider, or a payor. Centralized prescription drug or medication order processing does not include the dispensing of a prescription drug but includes any of the following:

(A) receiving, interpreting, or clarifying prescription drug or medication drug orders;

(B) data entering and transferring of prescription drug or medication order information;

(C) performing drug regimen review;

(D) obtaining refill and substitution authorizations;

(E) verifying accurate prescription data entry;

(F) interpreting clinical data for prior authorization for dispensing;

(G) performing therapeutic interventions; and

(H) providing drug information concerning a patient's prescription.

(2) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or, if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each Class G pharmacy shall have one pharmacist-in-charge who is employed on a full-time basis, who may be the pharmacist-in-charge for only one such pharmacy.

(B) Responsibilities. The pharmacist-in-charge shall have responsibility for the practice of pharmacy at the pharmacy for which he or she is the pharmacist-in-charge. The pharmacist-in-charge may advise the owner on administrative or operational concerns. The pharmacist-in-charge shall have responsibility for, at a minimum, the following:

(i) education and training of pharmacy technicians and pharmacy technician trainees;

(ii) maintaining records of all transactions of the Class G pharmacy required by applicable state and federal laws and sections;

(iii) adherence to policies and procedures regarding the maintenance of records in a data processing system such that the data processing system is in compliance with Class G pharmacy requirements; and

(iv) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or sections governing the practice of pharmacy.

(2) Owner. The owner of a Class G pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(B) establishment of policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by sufficient number of additional licensed pharmacists as may be required to operate the Class G pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting his or her responsibilities.

(iii) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and pharmacy technician trainees and for designating and delegating duties, other than those listed in subparagraph (B) of this paragraph, to pharmacy technicians and phar-

macy technician trainees. Each pharmacist shall be responsible for any delegated act performed by pharmacy technicians and pharmacy technician trainees under his or her supervision.

(iv) Pharmacists shall directly supervise pharmacy technicians and pharmacy technician trainees who are entering prescription data into the pharmacy's data processing system by one of the following methods.

(I) Physically present supervision. A pharmacist shall be physically present to directly supervise a pharmacy technician or pharmacy technician trainee who is entering prescription order or medication order data into the data processing system. Each prescription or medication order entered into the data processing system shall be verified at the time of data entry.

(II) Electronic supervision. A pharmacist may electronically supervise a pharmacy technician or pharmacy technician trainee who is entering prescription order or medication order data into the data processing system provided the pharmacist:

(-a-) is on-site, in the pharmacy where the technician/trainee is located;

(-b-) has immediate access to any original document containing prescription or medication order information or other information related to the dispensing of the prescription or medication order. Such access may be through imaging technology provided the pharmacist has the ability to review the original, hardcopy documents if needed for clarification; and

(-c-) verifies the accuracy of the data entered information prior to the release of the information to the system for storage.

(v) All pharmacists while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties which may only be performed by a pharmacist are as follows:

(i) receiving oral prescription drug or medication orders and reducing these orders to writing, either manually or electronically;

(ii) interpreting prescription drug or medication orders;

(iii) selection of drug products;

(iv) verifying the data entry of the prescription drug or medication order information at the time of data entry prior to the release of the information to a Class A, Class C, or Class E pharmacy for dispensing;

(v) communicating to the patient or patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment, the pharmacist deems significant, as specified in §291.33(c) of this title (relating to Operational Standards);

(vi) communicating to the patient or the patient's agent on his or her request information concerning any prescription drugs dispensed to the patient by the pharmacy;

(vii) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records;

(viii) interpreting patient medication records and performing drug regimen reviews; and

(ix) performing a specific act of drug therapy management for a patient delegated to a pharmacist by a written protocol from a physician licensed in this state in compliance with the Medical Practice Act.

(4) Pharmacy Technicians and Pharmacy Technician Trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Duties.

(i) Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in paragraph (3)(B) of this subsection.

(ii) A pharmacist may delegate to pharmacy technicians and pharmacy technician trainees any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(I) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians and pharmacy technician trainees;

(II) pharmacy technicians and pharmacy technician trainees are under the direct supervision of and responsible to a pharmacist; and

(iii) Pharmacy technicians and pharmacy technician trainees may perform only nonjudgmental technical duties associated with the preparation of prescription drugs, as follows:

(I) initiating and receiving refill authorization requests; and

(II) entering prescription or medication order data into a data processing system.

(C) Ratio of pharmacist to pharmacy technicians and pharmacy technician trainees. A Class G pharmacy may have a ratio of pharmacists to pharmacy technicians/pharmacy technician trainees of 1:6 provided:

(i) at least five are pharmacy technicians and not pharmacy technician trainees; and

(ii) the pharmacy has written policies and procedures regarding the supervision of pharmacy technicians and pharmacy technician trainees.

(5) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows.

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the board.

(B) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(C) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(D) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

(d) Operational Standards.

(1) General requirements.

(A) A Class A, Class C, or Class E Pharmacy may outsource prescription drug or medication order processing to a Class G pharmacy provided the pharmacies:

(i) have:

(I) the same owner; or

(II) entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations; and

(ii) share a common electronic file or have appropriate technology to allow access to sufficient information necessary or required to perform a non-dispensing function.

(B) A Class G pharmacy shall comply with the provisions applicable to the class of pharmacy contained in either §§291.31 - 291.35 of this title (relating to Definitions, Personnel, Operational Standards, Records, and Official Prescription Requirements in Class A (Community) Pharmacies), or §§291.72 - 291.75 of this title (relating to Definitions, Personnel, Operational Standards, and Records in a Class C (Institutional) Pharmacy), or §§291.102 - 291.105 of this title (relating to Definitions, Personnel, Operational Standards, and Records in a Class E (Non-Resident) Pharmacy) to the extent applicable for the specific processing activity and this section including:

(i) duties which must be performed by a pharmacist; and

(ii) supervision requirements for pharmacy technicians and pharmacy technician trainees.

(2) Licensing requirements.

(A) A Class G pharmacy shall register with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) A Class G pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(C) A Class G pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.3 of this title.

(D) A Class G pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title.

(E) A Class G pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(F) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(G) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(3) Environment.

(A) General requirements.

(i) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be in good operating condition.

(ii) The pharmacy shall be properly lighted and ventilated.

(B) Security.

(i) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drug records.

(ii) Pharmacies shall employ appropriate measures to ensure that security of prescription drug records is maintained at all times to prohibit unauthorized access.

(4) Policy and Procedures. A policy and procedure manual shall be maintained by the Class G pharmacy and be available for inspection. The manual shall:

(A) outline the responsibilities of each of the pharmacies;

(B) include a list of the name, address, telephone numbers, and all license/registration numbers of the pharmacies involved in centralized prescription drug or medication order processing; and

(C) include policies and procedures for:

(i) protecting the confidentiality and integrity of patient information;

(ii) maintenance of appropriate records to identify the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performed any processing;

(iii) complying with federal and state laws and regulations;

(iv) operating a continuous quality improvement program for pharmacy services designed to objectively and systematically monitor and evaluate the quality and appropriateness of patient care, pursue opportunities to improve patient care, and resolve identified problems; and

(v) annually reviewing the written policies and procedures and documenting such review.

(e) Records.

(1) every record required to be kept under the provisions this section shall be:

(A) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Fail-

ure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) The pharmacy shall maintain appropriate records which identify, by prescription drug or medication order, the name(s), initials, or identification code(s) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performs a processing function for a prescription drug or medication order. Such records may be maintained:

(A) separately by each pharmacy and pharmacist; or

(B) in a common electronic file as long as the records are maintained in such a manner that the data processing system can produce a printout which lists the functions performed by each pharmacy and pharmacist.

(3) In addition, the pharmacy shall comply with the record keeping requirements applicable to the class of pharmacy to the extent applicable for the specific processing activity and this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8037

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22 TAC §291.155

The Texas State Board of Pharmacy adopts new §291.155, concerning Limited Prescription Delivery Pharmacy (Class H). New §291.155 is adopted with changes to the proposed text based on comments received.

The new rule will establish a new class of pharmacy, Class H Pharmacies, to allow for the limited delivery of prescriptions for dangerous drugs.

Comments were received from Montgomery County Hospital District suggesting that the rules allow for counties with pharmacies to have Class H pharmacies and that the number of days prescriptions may be stored at the pharmacy be increased to 15 or 20 days. The Board disagrees with the comment to allow counties with pharmacies to have Class H pharmacies since counties with pharmacies can serve the patients needs. The Board agrees with the comment to increase the number of days for prescription storage and changes the rule to allow Class H pharmacies to store the prescriptions for 15 days.

The new rule is adopted under §§551.002, 554.051, and 560.053 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §560.053 as authorizing the agency to adopt rules establishing additional pharmacy classifications.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.155. Limited Prescription Delivery Pharmacy (Class H).

(a) Purpose.

(1) The purpose of this section is to provide standards for a limited prescription delivery pharmacy.

(2) Any facility established for the primary purpose of limited prescription delivery by a Class A pharmacy shall be licensed as a Class H pharmacy under the Act. A Class H pharmacy shall not store bulk drugs, or dispense a prescription drug order.

(3) A Class H pharmacy may deliver prescription drug orders for dangerous drugs. A Class H pharmacy may not deliver prescription drug orders for controlled substances.

(b) Definitions. Any term not defined in this chapter shall have the definition set out in the Act, §551.003.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each Class H pharmacy shall have one pharmacist-in-charge who is employed or under written agreement, at least on a part-time basis, but may be employed on a full-time basis, and who may be the pharmacist-in-charge for more than one limited prescription delivery pharmacy.

(B) Responsibilities. The pharmacist-in-charge shall have responsibility for the practice of pharmacy at the pharmacy for which he or she is the pharmacist-in-charge. The pharmacist-in-charge may advise the owner on administrative or operational concerns. The pharmacist-in-charge shall have responsibility for, at a minimum, the following:

(i) education and training of pharmacy technicians and pharmacy technician trainees;

(ii) maintaining records of all transactions of the Class H pharmacy required by applicable state and federal laws and sections;

(iii) adherence to policies and procedures regarding the maintenance of records; and

(iv) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or sections governing the practice of pharmacy.

(2) Owner. The owner of a Class H pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(B) establishment of policies and procedures regarding maintenance, storage, and retrieval of records in compliance with state and federal requirements.

(3) Pharmacists.

(A) The pharmacist-in-charge shall be assisted by sufficient number of additional licensed pharmacists as may be required

to operate the Class H pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(B) All pharmacists shall assist the pharmacist-in-charge in meeting his or her responsibilities.

(C) Pharmacists shall be responsible for any delegated act performed by the pharmacy technicians under his or her supervision.

(4) Pharmacy Technicians and Pharmacy Technician Trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Duties. Duties include:

(i) delivery of previously verified prescription drug orders to a patient or patient's agent provided a record of prescriptions delivered is maintained; and

(ii) maintaining pharmacy records.

(5) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows.

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the board.

(B) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(C) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(D) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

(d) Operational Standards.

(1) General requirements. A Class A or Class E Pharmacy may outsource limited prescription delivery to a Class H pharmacy provided the pharmacies have entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations.

(2) Licensing requirements.

(A) A Class H pharmacy shall register with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) A Class H pharmacy must be owned by a hospital district and located in a county without another pharmacy.

(C) A Class H pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(D) A Class H pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.3 of this title.

(E) A Class H pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(F) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license. However, a pharmacy operated by the state or a political subdivision of the state that qualifies for a Class H license is not required to pay a fee to obtain a license.

(G) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(3) Environment.

(A) General requirements.

(i) The pharmacy shall have a designated area for the storage of previously verified prescription drug orders.

(ii) The pharmacy shall be arranged in an orderly fashion and kept clean.

(iii) A sink with hot and cold running water shall be available to all pharmacy personnel and shall be maintained in a sanitary condition at all times.

(B) Security.

(i) Only authorized personnel may have access to storage areas for dangerous drugs.

(ii) When a pharmacist, pharmacy technician or pharmacy technician trainee is not present all storage areas for dangerous drugs devices shall be locked by key, combination, or other mechanical or electronic means, so as to prohibit access by unauthorized individuals.

(iii) The pharmacist-in-charge shall be responsible for the security of all storage areas for dangerous drugs including provisions for adequate safeguards against theft or diversion of dangerous drugs, and records for such drugs.

(iv) Housekeeping and maintenance duties shall be carried out in the pharmacy, while the pharmacist-in-charge, consultant pharmacist, staff pharmacist, or pharmacy technician/trainee is on the premises.

(4) Library. A reference library shall be maintained which includes current copies of the following in hard copy or electronic format:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act;

(C) at least one current or updated patient information reference such as:

(i) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(ii) a reference text or information leaflets which provide patient information; and

(D) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(5) Delivery of Drugs.

(A) The pharmacist-in-charge, consultant pharmacist, staff pharmacist, pharmacy technician, or pharmacy technician trainee must be present at the pharmacy to deliver prescriptions.

(B) Prescriptions for controlled substances may not be stored or delivered by the pharmacy.

(C) Prescriptions may be stored at the pharmacy for no more than 15 days. If prescriptions are not picked up by the patient, the medications are to be destroyed utilizing a reverse distribution service.

(D) The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall personally visit the pharmacy on at least a weekly basis and conduct monthly audits of prescriptions received and delivered by the pharmacy.

(e) Records.

(1) Every record required to be kept under the provisions this section shall be:

(A) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) A record of on-site visits by the pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall be maintained and include the following information:

(A) date of the visit;

(B) pharmacist's evaluation of findings; and

(C) signature of the visiting pharmacist.

(3) Records of prescription drug orders delivered to the Class H pharmacy shall include:

(A) patient name;

(B) name and quantity of drug delivered;

(C) name of pharmacy and address delivering the prescription drug order; and

(D) date received at the Class H pharmacy.

(4) Records of drugs delivered to a patient or patient's agent shall include:

(A) patient name;

(B) name, signature, or electronic signature of the person who picks up the prescription drug;

(C) date delivered; and

(D) the name of the drug and quantity delivered.

(5) Ownership of pharmacy records. For the purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 295. PHARMACISTS

22 TAC §295.5

The Texas State Board of Pharmacy adopts amendments to §295.5, concerning Pharmacist License or Renewal Fees. The amendments are adopted with changes to the proposed text published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5468). The Board voted to change the effective date of the fee decrease from October 1, 2011, to December 1, 2011.

The adopted amendments to §295.5 will decrease pharmacist initial and renewal licensing fees based on expected expenses.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§295.5. Pharmacist License or Renewal Fees.

(a) Biennial Registration. The Texas State Board of Pharmacy shall require biennial renewal of all pharmacist licenses provided under the Pharmacy Act, §559.002.

(b) Initial License Fee.

(1) Prior to December 1, 2011, the fee for the initial license shall be $281 for a two year registration and for processing the application and issuance of the pharmacist license as authorized by the Act, §554.006. Effective December 1, 2011, the fee for initial license shall be $194 for a two year registration and for processing the application and issuance of the pharmacist license as authorized by the Act, §554.006.

(2) In addition, the following fees shall be collected:

(A) prior to December 1, 2011, $13 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act, §564.051; effective December 1, 2011, $11 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act, §564.051;

(B) $10 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(C) $5 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(3) New pharmacist licenses shall be assigned an expiration date and initial fee shall be prorated based on the assigned expiration date.

(c) Renewal Fee.

(1) Prior to December 1, 2011, the fee for biennial renewal of a pharmacist license shall be $281 for processing the application and issuance of the pharmacist license as authorized by the Act, §554.006. Effective December 1, 2011, the fee for biennial renewal of a pharmacist license shall be $194 for processing the application and issuance of the pharmacist license as authorized by the Act, §554.006.

(2) In addition, the following fees shall be collected:

(A) prior to December 1, 2011, $13 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act, §564.051; effective December 1, 2011, $11 surcharge to fund a program to aid impaired pharmacists and pharmacy students as authorized by the Act, §564.051;

(B) $10 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(C) $2 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(d) Exemption from fee. The license of a pharmacist who has been licensed by the Texas State Board of Pharmacy for at least 50 years or who is at least 72 years old shall be renewed without payment of a fee provided such pharmacist is not actively practicing pharmacy. The renewal certificate of such pharmacist issued by the board shall reflect an inactive status. A person whose license is renewed pursuant to this subsection may not engage in the active practice of pharmacy without first paying the renewal fee as set out in subsection (b) of this section.

(e) Duplicate or Amended Certificates.

(1) The fee for issuance of an amended pharmacist's license renewal certificate shall be $20.

(2) The fee for issuance of an amended license to practice pharmacy (wall certificate) only, or renewal certificate and wall certificate shall be $35.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 2010.

TRD-201004978
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: September 14, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 305-8037

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CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.4

The Texas State Board of Pharmacy adopts amendments to §297.4, concerning Fees. The amendments are adopted with changes to the proposed text published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5469). The Board voted to change the effective date of the fee decrease from October 1, 2011, to December 1, 2011.

The adopted amendments to §297.4 will decrease pharmacy technician and pharmacy technician trainee registration fees based on expected expenses.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§297.4. Fees.

(a) Pharmacy technician trainee.

(1) Prior to December 1, 2011, the fee for registration shall be $54 and is composed of the following fees:

(A) $46 for processing the application and issuance of the pharmacy technician trainee registration as authorized by the Act, §568.005;

(B) $3 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(C) $5 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(2) Effective December 1, 2011, the fee for registration shall be $41 and is composed of the following fees:

(A) $34 for processing the application and issuance of the pharmacy technician trainee registration as authorized by the Act, §568.005;

(B) $2 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(C) $5 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(b) Pharmacy technician.

(1) Biennial Registration. The board shall require biennial renewal of all pharmacy technician registrations provided under Chapter 568 of the Act.

(2) Initial Registration Fee.

(A) Prior to December 1, 2011, the fee for initial registration shall be $83 for a two year registration and is composed of the following fees:

(i) $75 for processing the application and issuance of the pharmacy technician registration as authorized by the Act, §568.005;

(ii) $3 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(iii) $5 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(B) Effective December 1, 2011, the fee for initial registration shall be $64 for a two year registration and is composed of the following fees:

(i) $56 for processing the application and issuance of the pharmacy technician registration as authorized by the Act, §568.005;

(ii) $3 surcharge to fund the TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(iii) $5 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(C) The initial registration fee shall be prorated based on the assigned expiration date.

(3) Renewal Fee.

(A) Prior to December 1, 2011, the fee for biennial renewal of a pharmacy technician registration shall be $80 and is composed of the following:

(i) $75 for processing the application and issuance of the pharmacy technician registration as authorized by the Act, §568.005;

(ii) $3 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(iii) $2 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(B) Effective December 1, 2011, the fee for biennial renewal of a pharmacy technician registration shall be $61 and is composed of the following:

(i) $56 for processing the application and issuance of the pharmacy technician registration as authorized by the Act, §568.005;

(ii) $3 surcharge to fund TexasOnline as authorized by Chapter 2054, Subchapter I, Government Code; and

(iii) $2 surcharge to fund the Office of Patient Protection as authorized by Chapter 101, Subchapter G, Occupations Code.

(c) Duplicate or Amended Certificates. The fee for issuance of a duplicate or amended pharmacy technician trainee registration certificate or pharmacy technician registration renewal certificate shall be $20.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201004980
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: September 14, 2010
Proposal publication date: June 25, 2010
For further information, please call: (512) 305-8037

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.2

The Texas State Board of Examiners of Psychologists adopts amendments to §465.2, concerning Supervision, without changes to the proposed text as published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4304) and will not be republished.

The amendments are being adopted to ensure the protection and safety of the public.

The adopted amendments will help to clarify the rule.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004936
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 13, 2010
Proposal publication date: May 28, 2010
For further information, please call: (512) 305-7706

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22 TAC §465.37

The Texas State Board of Examiners of Psychologists adopts amendments to §465.37, concerning Compliance with All Applicable Laws, with changes to the proposed text as published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4304) and will be republished.

The amendments are being adopted to ensure the protection and safety of the public.

The adopted amendments will help to clarify the rule.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§465.37. Compliance with All Applicable Laws.

Licensees comply with all applicable state and federal laws affecting the practice of psychology including, but not limited to:

(1) Texas Health and Safety Code, Chapter 611, Mental Health Record;

(2) Texas Family Code

(A) Chapter 32, Consent to Medical, Dental, Psychological and Surgical Treatment,

(B) Chapter 153, Rights to Parents and Other Conservators to Consent to Treatment and Access to Child's Records, and

(C) Chapter 261, Duty to Report Child Abuse and Neglect;

(3) Texas Human Resource Code, Chapter 48, Duty to Report Elder Abuse and Neglect;

(4) Texas Civil Practice and Remedy Code, Chapter 81, Duty to Report Sexual Exploitation of a Patient by a Mental Health Services Provider;

(5) Texas Insurance Code as it relates to submission of billing and third-party payments for mental health services provided by a licensee;

(6) Texas Code of Criminal Procedure, Chapter 46B. Incompetency to Stand Trial, Art. 46B.025. Expert's Report and Art. 46B.026. Report Deadline; and Chapter 46C. Insanity Defense, Art 46C.105. Reports Submitted by Experts; and

(7) 18 United States Code §1347 Health Care Fraud.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201004937
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 13, 2010
Proposal publication date: May 28, 2010
For further information, please call: (512) 305-7706

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CHAPTER 469. COMPLAINTS AND ENFORCEMENT

22 TAC §469.7

The Texas State Board of Examiners of Psychologists adopts amendments to §469.7, concerning Persons with Criminal Backgrounds, with changes to the proposed text as published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4304) and will be republished.

The amendments are being adopted to ensure the protection and safety of the public.

The adopted amendments will help to clarify the rule.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§469.7. Persons with Criminal Backgrounds.

(a) The Board may revoke or suspend an existing valid license, disqualify a person from receiving or renewing a license, or deny to a person the opportunity to be examined for a license due to a felony or misdemeanor conviction, or a plea of guilty or nolo contendere followed by deferred adjudication, if the offense directly relates to the performance of the activities of a licensee and the conviction directly affects such person's present fitness to perform as a licensee of this Board.

(b) Criminal History Evaluation Letters.

(1) In compliance with Chapter 53 of the Texas Occupations Code, the Board will provide criminal history evaluation letters.

(2) A person may request the Board to provide a criminal history evaluation letter if the person is planning to enroll or is enrolled in an educational program that prepares the person for a license with this Board and the person has reason to believe that the person is ineligible for licensure due to a conviction or deferred adjudication for a felony or misdemeanor offense.

(3) The requestor must submit to the Board a completed Board application form requesting an evaluation letter, the required fee, and certified copies of court documentation about all convictions and resolution to the Board.

(4) Before submitting the application the requestor must obtain a fingerprint criminal history record check and have it mailed directly to the Board.

(5) The Board has the authority to investigate a request for a criminal history evaluation letter and may require that the requestor provide additional information about the convictions and other dispositions if requested by the Board.

(6) The Board will provide a written response to the requestor within 90 days of the Board's receipt of the request, unless a more extensive investigation is required or the requestor fails to comply with a Board investigation. The Board's evaluation letter will state the Board's determination on each ground for potential ineligibility presented by the requestor.

(7) In the absence of new evidence known to but not disclosed by the requestor or not reasonably available to the Board at the time the letter is issued, the Board's ruling on the request determines the requestor's eligibility only with respect to the grounds for potential ineligibility set out in the letter.

(c) The Board shall revoke an existing valid license, disqualify a person from receiving or renewing a license, or deny to a person the opportunity to be examined for a license due to a felony conviction under Section 35A.02 of the Texas Penal Code, concerning Medicaid fraud.

(d) No person currently serving a sentence in a penal institution or correctional facility following a felony conviction is eligible to obtain or renew his/her license.

(e) In determining whether a criminal conviction directly relates to the performance of a licensee, the Board shall consider the factors listed in the Texas Occupations Code, Chapter 53.

(f) Those crimes which the Board considers as directly related to the performance of a licensee include but are not limited to:

(1) a misdemeanor and/or felony offense under the following titles of the Texas Penal Code:

(A) Title 5, pertaining to offenses against the person (for example, homicide, kidnapping, sexual offenses, and assaultive offenses);

(B) Title 7, pertaining to offenses against property (for example, arson, robbery, burglary, theft, fraud, money laundering, and insurance fraud);

(C) Title 8, pertaining to offenses against public administration (for example, bribery, perjury, and obstruction of justice);

(D) Title 9, pertaining to offenses against public order and decency (for example, disorderly conduct and public indecency);

(E) Title 10, pertaining to offenses against public health and safety (for example, weapons offenses, gambling, and intoxication offenses); and

(F) Title 4, pertaining to the offenses of attempting or conspiring to commit the offenses listed in subparagraphs (A) - (F) of this paragraph.

(2) any criminal violation of the Psychologists' Licensing Act or other statutes regulating or pertaining to the profession of psychology;

(3) any criminal violation of statutes regulating other professions in the healing arts, which includes, but is not limited to medicine and nursing;

(4) any crime involving moral turpitude;

(5) any offense involving the failure to report abuse;

(6) any state or federal drug offense, including violations of the Controlled Substances and Dangerous Drugs Act; and

(7) any other misdemeanor or felony that the Board may consider in order to promote the public safety and welfare, as well as the intent of the Act and these rules.

(g) In determining whether a criminal conviction directly affects present fitness of the licensee, the Board shall consider the factors listed in Texas Occupations Code, §53.023.

(h) It shall be the responsibility of the licensee to secure and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities regarding all criminal offenses.

(i) The licensee shall also furnish proof in such form as may be required by the Board that he/she maintained a record of steady employment and has supported his/her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines and restitution as may have been ordered in all criminal cases in which he/she has been convicted.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004938
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 13, 2010
Proposal publication date: May 28, 2010
For further information, please call: (512) 305-7706

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 1. TEXAS BOARD OF HEALTH
SUBCHAPTER V. NEGOTIATION AND MEDIATION OF CERTAIN CONTRACT DISPUTES

25 TAC §§1.431 - 1.447

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§1.431 - 1.447, concerning the negotiation and mediation of certain contract claims against the department, without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4568), and the sections will not be republished.

BACKGROUND AND PURPOSE

Government Code, Chapter 2260, was enacted to provide an administrative remedy for state agency contractors if the contractors believe the state has breached a contract with them. Each state agency is required to adopt its own 2260 rules.

The repeals are necessary to eliminate duplication and to bring the department's 2260 rules into line with the requirements of Acts 2003, 78th Legislature, Chapter 198, §1.09 (House Bill 2292). When House Bill 2292 consolidated the department's legacy agencies, the Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Commission on Alcohol and Drug Abuse (TCADA) into the department, 25 Texas Administrative Code (TAC), Part 1, was designated as the location for all department rules. Chapter 4 of Part 1 has been designated as the location for all department contracting rules. TDH, TDMHMR, and TCADA each had adopted 2260 rules before House Bill 2292 was enacted on September 1, 2004. TDH's 2260 rules were located in Chapter 1; TDMHMR's were located in Chapter 417; and TCADA's were located in Chapter 441. After consolidation, it was no longer necessary to have three sets of 2260 rules. The department has reviewed each legacy agency's set of 2260 rules, culled out the duplicates for repeal, updated the remaining sections, and drafted one set using those remaining sections. The department adopts the repeal of the 2260 rules in Chapters 1, 417, and 441, and adopts the new rules in Chapter 4, DSHS Contracting Rules. The repeals and new rules are necessary to provide a set of updated 2260 rules that are located in Chapter 4, the chapter designated for the department's contracting rules. The new rules are similar to the 2260 rules adopted by the Health and Human Services Commission.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 1.431 - 1.447 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The department adopts the repeal of §§1.431 - 1.447 to eliminate duplicate and inaccurate legacy agency rules and to combine

the updated 2260 rules in 25 TAC Chapter 4, DSHS Contracting Rules.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005076
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: September 16, 2010
Proposal publication date: June 4, 2010
For further information, please call: (512) 458-7111 x6972

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CHAPTER 4. DSHS CONTRACTING RULES
SUBCHAPTER B. CERTAIN CONTRACT CLAIMS AGAINST THE DEPARTMENT

25 TAC §§4.11 - 4.24

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §§4.11 - 4.24, concerning the negotiation and mediation of certain contract claims against the department, without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4569), and the sections will not be republished.

BACKGROUND AND PURPOSE

Government Code, Chapter 2260, was enacted to provide an administrative remedy for state agency contractors if the contractors believe the state has breached a contract with them. Each state agency is required to adopt its own 2260 rules.

The new rules are necessary to eliminate duplication and to bring the department's 2260 rules into line with the requirements of Acts 2003, 78th Legislature, Chapter 198, §1.09 (House Bill 2292). When House Bill 2292 consolidated the department's legacy agencies, the Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Commission on Alcohol and Drug Abuse (TCADA) into the department, 25 Texas Administrative Code (TAC), Part 1, was designated as the location for all department rules. Chapter 4 of Part 1 has been designated as the location for all department contracting rules. TDH, TDMHMR, and TCADA each had adopted 2260 rules before House Bill 2292 was enacted on September 1, 2004. TDH's 2260 rules were located in Chapter 1; TDMHMR's were located in Chapter 417; and TCADA's were located in Chapter 441. After consolidation, it was no longer necessary to have three sets of 2260 rules. The department has reviewed each legacy agency's set of 2260 rules, culled out the duplicates for repeal, updated the remaining sections, and drafted one set using those remaining sections. The department adopts the repeal of the 2260 rules in Chapters 1, 417, and 441, and adopts the new rules in Chapter 4, DSHS Contracting Rules. The repeals and new rules are necessary to provide a set of updated 2260 rules that are located in Chapter 4, the chapter designated for the department's contracting rules. The new rules are similar to the 2260 rules adopted by the Health and Human Services Commission.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 1.431 - 1.447, 417.63, 417.901 - 417.925, and 441.201 - 441.205 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The department adopts the repeal of §§1.431 - 1.447, 417.63, 417.901 - 417.925, and 441.201 - 441.205 to eliminate duplicate and inaccurate legacy agency rules and to combine the updated 2260 rules in 25 TAC Chapter 4, DSHS Contracting Rules.

New §4.11 states the purpose of the 2260 rules. New §4.12 sets out their applicability. New §4.13 defines terms used in the 2260 rules. New §4.14 states that the 2260 rules are exclusive and required prerequisites to suit under Civil Practice and Remedies Code, Chapter 107 and Government Code, Chapter 2260. New §4.15 lists requirements for contractors to provide a notice to the department concerning a claim of breach of contract. New §4.16 provides requirements for the department to assert a counterclaim. New §4.17 allows the department and the contractor asserting the 2260 claim to request voluntary disclosure of additional information from each other and lists the types of information that may be requested. New §4.18 provides the timetable for negotiation and mediation, including authorizing the contractor to request a contested case hearing before the State Office of Administrative Hearings. New §4.19 sets out requirements for conduct of negotiation. New §4.20 states the settlement approval procedures for negotiation. New §4.21, concerning negotiated settlement agreement, provides parameters for negotiated settlement agreements. New §4.22 requires each party to be responsible for its own costs incurred in connection with a negotiation. New §4.23 states the requirements for the contractor to request a contested case hearing, if the contract claim is not resolved through negotiation. New §4.24 sets out the requirements for mediation, if the parties agree to mediation of the contract claim.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new sections are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005077
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: September 16, 2010
Proposal publication date: June 4, 2010
For further information, please call: (512) 458-7111 x6972

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CHAPTER 417. TDMHMR AND FACILITY RESPONSIBILITIES

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§417.63 and 417.901 - 417.925, concerning the negotiation and mediation of certain contract claims against the department, without changes to the proposed text as published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4575), and the sections will not be republished.

BACKGROUND AND PURPOSE

Government Code, Chapter 2260, was enacted to provide an administrative remedy for state agency contractors if the contractors believe the state has breached a contract with them. Each state agency is required to adopt its own 2260 rules.

The repeals are necessary to eliminate duplication and to bring the department's 2260 rules into line with the requirements of Acts 2003, 78th Legislature, Chapter 198, §1.09 (House Bill 2292). When House Bill 2292 consolidated the department's legacy agencies, the Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Commission on Alcohol and Drug Abuse (TCADA) into the department, 25 Texas Administrative Code (TAC), Part 1, was designated as the location for all department rules. Chapter 4 of Part 1 has been designated as the location for all department contracting rules. TDH, TDMHMR, and TCADA each had adopted 2260 rules before House Bill 2292 was enacted on September 1, 2004. TDH's 2260 rules were located in Chapter 1; TDMHMR's were located in Chapter 417; and TCADA's were located in Chapter 441. After consolidation, it was no longer necessary to have three sets of 2260 rules. The department has reviewed each legacy agency's set of 2260 rules, culled out the duplicates for repeal, updated the remaining sections, and drafted one set using those remaining sections. The department adopts the repeal of the 2260 rules in Chapters 1, 417, and 441, and adopts the new rules in Chapter 4, DSHS Contracting Rules. The repeals and new rules are necessary to provide a set of updated 2260 rules that are located in Chapter 4, the chapter designated for the department's contracting rules. The new rules are similar to the 2260 rules adopted by the Health and Human Services Commission.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 417.63 and 417.901 - 417.925 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The department adopts the repeal of §§417.63 and 417.901 - 417.925 to eliminate duplicate and inaccurate legacy agency rules and to combine the updated 2260 rules in 25 TAC Chapter 4, DSHS Contracting Rules.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER B. CONTRACTS MANAGEMENT FOR TDMHMR FACILITIES AND CENTRAL OFFICE

25 TAC §417.63

STATUTORY AUTHORITY

The repeal is authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201005078
Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER S. NEGOTIATION AND MEDIATION OF CERTAIN CONTRACT CLAIMS AGAINST TDMHMR

DIVISION 1. GENERAL

25 TAC §§417.901 - 417.905

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: June 4, 2010
For further information, please call: (512) 458-7111 x6972

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DIVISION 2. NEGOTIATION

25 TAC §§417.906 - 417.915

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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DIVISION 3. MEDIATION

25 TAC §§417.916 - 417.925

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005081
Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: June 4, 2010
For further information, please call: (512) 458-7111 x6972

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CHAPTER 441. GENERAL PROVISIONS

SUBCHAPTER B. CLAIMS AGAINST THE COMMISSION

25 TAC §§441.201 - 441.205

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§441.201 - 441.205, concerning the negotiation and mediation of certain contract claims against the department, without changes to the proposed text as published in the June 4, 2010, issue of the

Texas Register (35 TexReg 4577), and the sections will not be republished.

BACKGROUND AND PURPOSE

Government Code, Chapter 2260, was enacted to provide an administrative remedy for state agency contractors if the contractors believe the state has breached a contract with them. Each state agency is required to adopt its own 2260 rules.

The repeals are necessary to eliminate duplication and to bring the department's 2260 rules into line with the requirements of Acts 2003, 78th Legislature, Chapter 198, §1.09 (House Bill 2292). When House Bill 2292 consolidated the department's legacy agencies, the Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Commission on Alcohol and Drug Abuse (TCADA) into the department, 25 Texas Administrative Code (TAC), Part 1, was designated as the location for all department rules. Chapter 4 of Part 1 has been designated as the location for all department contracting rules. TDH, TDMHMR, and TCADA each had adopted 2260 rules before House Bill 2292 was enacted on September 1, 2004. TDH's 2260 rules were located in Chapter 1; TDMHMR's were located in Chapter 417; and TCADA's were located in Chapter 441. After consolidation, it was no longer necessary to have three sets of 2260 rules. The department has reviewed each legacy agency's set of 2260 rules, culled out the duplicates for repeal, updated the remaining sections, and drafted one set using those remaining sections. The department adopts the repeal of the 2260 rules in Chapters 1, 417, and 441, and adopts the new rules in Chapter 4, DSHS Contracting Rules. The repeals and new rules are necessary to provide a set of updated 2260 rules that are located in Chapter 4, the chapter designated for the department's contracting rules. The new rules are similar to the 2260 rules adopted by the Health and Human Services Commission.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 441.201 - 441.205 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The department adopts the repeal of §§441.201 - 441.205 to eliminate duplicate and inaccurate legacy agency rules and to combine the updated 2260 rules in 25 TAC Chapter 4, DSHS Contracting Rules.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001; and by Government Code, §2260.052, which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims under Chapter 2260. Review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

The Commissioner of Insurance (Commissioner) adopts amendments to §§3.1607, 3.4504, and 3.4505, concerning the minimum reserve standards for life insurance. The amendments are adopted without changes to the proposed text published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3413).

REASONED JUSTIFICATION. The amendments to §3.1607, relating to actuarial opinion and memorandum regulation, are necessary to provide an example that an insurance company's appointed actuary must consider when providing disclosure in the regulatory asset adequacy issues summary for asset adequacy interim results of concern. The example cites a situation in which assets may be insufficient to support the payment of benefits and expenses and the establishment of reserves during one or more interim periods. The amendments to §3.1607 are also necessary to: (i) modify the filing requirements under existing §3.1607(a)(5) for filing the regulatory asset adequacy issues summary with the Commissioner; (ii) update obsolete statutory citations to the Insurance Code as a result of the enactment of the non-substantive revision of the Insurance Code; and (iii) correct rule citation style errors. The amendments to §3.4504 and §3.4505, relating to valuation of life insurance policies, are necessary to: (i) replace a graphic in existing §3.4504(2) to be consistent with §7.18; (ii) refine the optional minimum mortality standard for deficiency reserves stipulated in §3.4505 by removing certain constraints and allowing for more flexibility in the calculation of deficiency reserves; (iii) require additional disclosure in the regulatory asset adequacy issues summary required under existing §3.1607 with regard to the impact of the insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods;

(iv) update obsolete statutory citations to the Insurance Code as a result of the enactment of the non-substantive revision of the Insurance Code; (v) correct citations to erroneously cross-referenced rules; (vi) clarify the definition of and calculation for the term *segmented reserves* in §3.4505(9); and (vii) make several other minor text changes to correct grammatical errors or to conform with current Texas Register or agency citation style. The amendments to §3.1607 and §3.4505 are modeled after and consistent with the National Association of Insurance Commissioner's (NAIC's) currently adopted Model Regulations 822 and 830. The amendments are expected to align reserve mortality to expected mortality for certain policies issued by life insurance companies, while retaining reasonable conservatism in reserves for these policies. As a result, the amendments are expected to reduce reserves not needed to support benefits.

The following provides an overview of and explains additional reasoned justification for the amendments.

The amendments to §3.1607(a)(5) are necessary to modify the requirements for a life insurance company to file the regulatory asset adequacy issues summary with the Commissioner. Under the amendments to §3.1607(a)(5), only domestic life insurance companies are required to file the regulatory asset adequacy issues summary with the Department's Actuarial Division/Financial Program, no later than March 15 of the year following the year for which a statement of actuarial opinion based on asset adequacy is required. Nondomestic life insurance companies are not required to file the regulatory asset adequacy issues summary under the amendments to §3.1607(a)(5), unless requested by the Commissioner. Under the amendments to §3.1607(c)(1)(D), the life insurance company's appointed actuary is required to consider the newly-specified example when providing disclosure in the regulatory asset adequacy issues summary for asset adequacy interim results of concern. The example and the required disclosure of any concern is also addressed in the amendments to §3.4505(b)(3). The purpose of the example and required disclosure of any concern is to support financial monitoring efforts by detecting and addressing any such interim deficiencies.

An amendment to §3.4504(2) is necessary to replace a graphic in the definition of "Contract segmentation method" for consistency with §7.18. The new graphic contains the correct formula to calculate for segments using the contract segmentation method. Insurance companies have been required to use the correct formula contained in the graphic due to the Department's adoption by rule of the NAIC Accounting Practices and Procedures Manual in §7.18, concerning Statements of Statutory Accounting Principles. The amendment makes this graphic and formula consistent with the requirements in §7.18. An amendment to §3.4504(8) replaces incorrect references to §3.14007(a)(3) and (4) with the correct references to §3.4507(a)(3) and (4), concerning calculation of minimum valuation standard for flexible premium and fixed premium universal life insurance policies that contain provisions resulting in the ability of a policy owner to keep a policy in force over a secondary guarantee period. An amendment to §3.4504(8) also is necessary to delete a reference to a rule title in this subsection because the rule's title already is referenced in §3.4504, to conform to current Department citation style. The amendment to §3.4504(9)(A) adds the phrase "and endowment benefits" to clarify the definition of and calculation for the term *segmented reserves* in §3.4504(9).

The amendments to §3.4505(a)(2) and (3) are necessary to change the word "The" to "the" and the word "Any" to "any" respectively for purposes of consistency and to conform with current agency style The amendments to §3.4505(a)(2) are also necessary to make clarifying changes to punctuation and grammar within the paragraph, by replacing a period with a semicolon and adding the word "or" to the end of the paragraph. The amendments to §3.4505(b)(3) remove certain "X factor" constraint provisions and allow for more flexibility in the calculation of deficiency reserves to reflect anticipated mortality. Deficiency reserves are in addition to initially calculated minimum reserves when actual premiums and reserve assumptions are less than statutory net premiums and assumptions used in minimum reserve calculations. Anticipated mortality is approximated from applying an "X factor" to statutory mortality. An "X factor" is an experience factor that allows insurance companies to reflect their actual anticipated mortality experience in calculating deficiency reserves. Specifically, these amendments to §3.4505(b)(3) remove the constraint that the "X factor" cannot go below 20 percent and also remove the constraint that "X factors" cannot decrease in the future. Also, current requirements in existing §3.4505 require the appointed actuary to opine annually on the reasonableness of the resulting "X factor" and to adjust as necessary. The amendments to §3.4505(b)(3) also will require additional disclosure in the regulatory asset adequacy issues summary provided in existing §3.1607. This additional disclosure requires the appointed actuary to disclose the impact of insufficiency of assets to support payment of benefits and expenses during one or more interim periods over the asset adequacy analysis projection. An amendment to §3.4505(b)(3) also is necessary to delete a reference to a rule title in this subsection because the rule's title already is referenced in §3.4505, to conform to current Department citation style. An amendment to §3.4505(b)(3) is further necessary to replace "%" with the word "percent" to conform to current Texas Register citation style. Amendments to §3.4505(b)(3)(G)(i) and (f) replace incorrect references to §3.1608, concerning statement of actuarial opinion based on asset adequacy analysis, with correct references to §3.1607, concerning description of actuarial memorandum including an asset adequacy analysis and regulatory asset adequacy issues summary.

Amendments are also necessary to update obsolete statutory citations to the Insurance Code as a result of the enactment of the non-substantive revision of the Insurance Code. This will result in easier use and readability of the rules. Amendments to §§3.1607(a)(1) and (5) and (c)(3), 3.4504(1), (3), (5) and (11), and 3.4505(a)(1) and (b)(1) are necessary to update statutory citations to conform with the non-substantive revised Insurance Code. The amendment to §3.1607(c)(3) replaces the statutory reference to "Article 1.15" with "Chapter 401." Article 1.15 was repealed in the nonsubstantive Insurance Code revision, Acts 2005, 79th Legislature, Chapter 727, §1, effective April 1, 2007. Article 1.15 was re-adopted as Chapter 401 in the same nonsubstantive Insurance Code revision. Amendments to §§3.1607(a)(1) and (5), 3.4504(1), (3), (5) and (11), and 3.4505(a)(1) and (b)(1) replace statutory references to provisions in "Article 3.28" with statutory references to provisions in "Chapter 425." Article 3.28 was repealed in the nonsubstantive Insurance Code revision, Acts 2005, 79th Legislature, Chapter 727, §1, effective April 1, 2007. Article 3.28 was re-adopted as Chapter 425 in the same nonsubstantive Insurance Code revision.

HOW THE SECTIONS WILL FUNCTION. Amendments to §3.1607(a)(1) and (5), and (c)(3) update citations which have changed due to non-substantive revision of the Insurance

Code. Amendments to §3.1607(a)(1) - (3) and (5), and (c)(3) also update provisions to conform to current Department or Texas Register style or to correct citation errors. Amendments to §3.1607(a)(5) and (c)(1)(D) require additional disclosure in the regulatory asset adequacy issues summary required under existing §3.1607 with regard to the impact of the insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods.

Amendments to §3.4504(1), (3), (5) and (11) update statutory citations to conform with the non-substantive revised Insurance Code. Amendments to §3.4504(1) - (3), (5), (8), (9)(B), and (11) update provisions to conform to current Department or Texas Register style or to correct citation errors. An amendment to §3.4504(2) also replaces a graphic in the definition of "Contract segmentation method" for consistency with §7.18, concerning the NAIC Accounting Practices and Procedures Manual. An amendment to §3.4504(8) replaces incorrect references to §3.14007(a)(3) and (4) with the correct references to §3.4507(a)(3) and (4), concerning calculation of minimum valuation standard for flexible premium and fixed premium universal life insurance policies that contain provisions resulting in the ability of a policy owner to keep a policy in force over a secondary guarantee period. An amendment to §3.4504(8) also deletes a reference to a rule title in this subsection because the rule's title already is referenced in §3.4504, to conform to current Department citation style. The amendment to §3.4504(9)(A) adds the phrase "and endowment benefits" to clarify the definition of and calculation for the term *segmented reserves* in §3.4504(9).

Amendments to §3.4505(a)(1) and (b)(1) update statutory citations to conform with the non-substantive revised Insurance Code. Amendments to §3.4505(a)(1) - (3) and (b)(1) - (3) and (f) update provisions to conform to current Department or Texas Register style, to reflect reorganization, or to correct citation, form, grammatical, or punctuation errors. The amendments to §3.4505(b)(3) also remove certain "X factor" constraint provisions and allow for more flexibility in the calculation of deficiency reserves to reflect anticipated mortality. The amendments to §3.4505(b)(3) also will require additional disclosure in the regulatory asset adequacy issues summary provided in existing §3.1607. An amendment to §3.4505(b)(3) also deletes a reference to a rule title in this subsection because the rule's title already is referenced in §3.4505, to conform to current Department citation style. Amendments to §3.4505(b)(3)(G)(i) and (f) also replace incorrect references to §3.1608, concerning statement of actuarial opinion based on asset adequacy analysis, with correct references to §3.1607, concerning description of actuarial memorandum including an asset adequacy analysis and regulatory asset adequacy issues summary.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

SUBCHAPTER Q. ACTUARIAL OPINION AND MEMORANDUM REGULATION

28 TAC §3.1607

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code §§421.001(c), 425.054, 425.058(c)(3), and 36.001. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the National Association of Insurance Commissioners for establishing reserves for each line of insurance. Section 425.054(c) provides the Commissioner by rule shall specify the requirements of an actuarial opinion including any matters considered necessary to the opinion's scope. Section 425.058(c) provides that for an ordinary life insurance policy issued on the standard basis, excluding any disability or accidental death benefits in the policy and to which Chapter 1105, Subchapter B, applies, the applicable mortality table is the Commissioners' 1980 Standard Ordinary Mortality Table; at the insurer's option for one or more specified life insurance plans, the Commissioners' 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors; or any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by Commissioner rule for use in determining the minimum standard valuation for a policy to which this subdivision applies. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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SUBCHAPTER EE. VALUATION OF LIFE INSURANCE POLICIES

28 TAC §3.4504, §3.4505

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code §§421.001(c), 425.054, 425.058(c)(3), and 36.001. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the National Association of Insurance Commissioners for establishing reserves for each line of insurance. Section 425.054(c) provides the Commissioner by rule shall specify the requirements of an actuarial opinion including any matters considered necessary to the opinion's scope. Section 425.058(c) provides that for an ordinary life insurance policy issued on the standard basis, excluding any disability or accidental death benefits in the policy and to which Chapter 1105, Subchapter B, applies, the applicable mortality table is the Commissioners' 1980 Standard Ordinary Mortality Table; at the insurer's option for one or more specified life insurance plans, the Commissioners' 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors; or any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by Commissioner rule for use in determining the minimum standard valuation for a policy to which this subdivision applies. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER MM. PREFERRED MORTALITY TABLES

28 TAC §3.9403, §3.9404

The Commissioner of Insurance (Commissioner) adopts amendments to §3.9403 and §3.9404, concerning the minimum reserve standards for life insurance. The amendments are adopted with changes to the proposed text published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3419).

REASONED JUSTIFICATION. The amendments are necessary to: (i) allow life insurance companies the option to substitute the 2001 CSO Preferred Class Structure Mortality Table for the 2001 CSO Mortality Table as the minimum valuation standard for contracts issued on or after May 1, 2003, and prior to January 1, 2007, subject to certain specified conditions; (ii) make several reorganizational changes to existing §3.9403 for better organization and clarity of the proposed and existing rules; and (iii) correct a rule citation style error in adopted §3.9403(d). The amendments to §3.9403 and §3.9404 are modeled after and consistent with the National Association of Insurance Commissioner's (NAIC's) currently adopted Model Regulation 815. The amendments also are expected to align reserve mortality to expected mortality for certain policies issued by life insurance companies, while retaining reasonable conservatism in reserves for these policies. As a result, the amendments are expected to reduce reserves not needed to support benefits.

The following provides an overview of and explains additional reasoned justification for the amendments.

The amendments to §3.9403 and §3.9404 are necessary to allow insurance companies the option to calculate reserves using the 2001 CSO preferred Class Structure Mortality table for policies issued on and after May 1, 2003, and prior to January 1, 2007, in lieu of using the 2001 CSO Mortality Tables, subject to meeting certain specified conditions. Additionally, amendments to §3.9403 are necessary to re-organize existing subsection (a) into subsections (a), (c), and (d), add a new subsection (b), and redesignate existing subsection (b) into subsection (e) for purposes of better organization and clarity of the proposed and existing rules. Subsection titles are added to assist in organization and provide clarity. The amendment to §3.9403(a) adds the subsection title "Policies Issued On or After January 1, 2007" to assist in clarifying the applicability of the 2001 CSO Preferred Class Structure Mortality Table to policies issued during this timeframe. New §3.9403(b) adds the subsection title "Policies Issued On or After May 1, 2003, and Prior to January 1, 2007" to assist in clarifying the applicability of the 2001 CSO Preferred Class Structure Mortality Table to policies issued during this timeframe. New §3.9403(b) also specifies that an insurer may elect to use the 2001 CSO Preferred Class Structure Mortality Table as the minimum valuation standard for these policies, subject to the consent of the Commissioner and the conditions of §3.9404. New §3.9403(c) adds the subsection title "Requirements to Make Election" and changes the existing reference to "No such election" to "No election in subsection (a) or (b)." These amendments are necessary to clarify the applicability of certain requirements for an insurer that elects to use the 2001 CSO Preferred Class Structure Mortality Table under either the amendments to §3.9403(a) or under new §3.9403(b). New §3.9403(d) adds the subsection title "2001 CSO Preferred Class Structure Mortality Table Treatment" to assist in clarifying that this preferred table is considered part of the 2001 CSO Mortality Table for purposes of reserves. New §3.9403(d) also replaces the word "title" with "chapter" to conform to current Texas Register citation style. Newly redesignated §3.9403(e) adds the subsection title "Adoption by Reference" to assist in clarifying that this redesignated subsection concerns the adoption by reference of the 2001 CSO Preferred Class Structure Mortality Table. New §3.9404(d) is necessary to enumerate the conditions to be met before an insurance company can utilize the optional minimum reserve standard for life insurance policies issued prior to January 1, 2007. The conditions require certain accounting treatment relating to the reinsurance of an insurance company's life insurance policies, and focuses on the appropriate amount of reinsurance credit to be taken. Specifically, the conditions require an aggregate adjustment to compensate for any excess reinsurance credit in order to use the preferred tables for reserves for policies issued prior to January 1, 2007. Current requirements in existing §3.9403 and §3.9404 already allow for the 2001 CSO Preferred Class Structure Mortality Table to be used for policies issued on and after January 1, 2007. Additionally, current requirements in existing rules also require an annual actuarial certification from the appointed actuary which supports the use of these preferred tables for reserves.

While the Department did not receive any comments on the proposal, the Department has made nonsubstantive changes to the proposed text as adopted. The Department has determined that nonsubstantive changes are necessary in the following provisions as proposed. The Department has made a nonsubstantive change in §3.9403(b) to replace the words "the commissioner's" with the word "such" for purposes of ease of readability. The Department also has made a nonsubstantive change to new §3.9403(e), by replacing the capital "C" with a lower case "c" in the word "commissioner" and removing the words "of Insurance" for internal consistency in the use of the word "commissioner." For clarity purposes, the Department has made a nonsubstantive change to §3.9404(c) as proposed by inserting the word "experience" between the word "mortality" and the word "and" to read "mortality records and. . ." Additionally, the Department has made a nonsubstantive change to the format of new §3.9404(d)(3), by removing the references to subparagraphs (A) and (B), for purposes of clarity. The Department also has made a nonsubstantive change to new §3.9404(d)(3), by replacing a semicolon with a comma after the word asset. None of the changes materially alter issues raised in the proposed rule, introduce new subject matter, or affect persons other than those previously on notice.

HOW THE SECTIONS WILL FUNCTION. Section 3.9403(a) has been re-organized into subsections (a), (c), and (d). Section 3.9403(a) also adds the subsection title "Policies Issued On or After January 1, 2007" to assist in clarifying the applicability of

the 2001 CSO Preferred Class Structure Mortality Table to policies issued during this timeframe. A new subsection (b) also has been added to §3.9403, with the added title "Policies Issued On or After May 1, 2003, and Prior to January 1, 2007" to assist in clarifying the applicability of the 2001 CSO Preferred Class Structure Mortality Table to policies issued during this timeframe. New §3.9403(b) also specifies that an insurer may elect to use of the 2001 CSO Preferred Class Structure Mortality Table as the minimum valuation standard for these policies, subject to the consent of the Commissioner and the conditions of §3.9404. Existing subsection (b) has been redesignated as subsection (e) for purposes of better organization and clarity. New §3.9403(c) adds the subsection title "Requirements to Make Election" and changes the existing reference to "No such election" to "No election in subsection (a) or (b)." These changes clarify the applicability of certain requirements for an insurer that elects to use the 2001 CSO Preferred Class Structure Mortality Table under either §3.9403(a) or (b). New §3.9403(d) adds the subsection title "2001 CSO Preferred Class Structure Mortality Table Treatment" to assist in clarifying that this preferred table is considered part of the 2001 CSO Mortality Table for purposes of reserves. Newly redesignated §3.9403(e) adds the subsection title "Adoption by Reference" to assist in clarifying that this redesignated subsection concerns the adoption by reference of the 2001 CSO Preferred Class Structure Mortality Table. New §3.9404(d) enumerates the conditions to be met before an insurance company can utilize the optional minimum reserve standard for life insurance policies issued prior to January 1, 2007. The conditions require certain accounting treatment relating to the reinsurance of an insurance company's life insurance policies, and focuses on the appropriate amount of reinsurance credit to be taken. Specifically, the conditions require an aggregate adjustment to compensate for any excess reinsurance credit in order to use the preferred tables for reserves for policies issued prior to January 1, 2007.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code §§421.001(c), 425.054, 425.058(c)(3), and 36.001. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the National Association of Insurance Commissioners for establishing reserves for each line of insurance. Section 425.054(c) provides the Commissioner by rule shall specify the requirements of an actuarial opinion including any matters considered necessary to the opinion's scope. Section 425.058(c) provides that for an ordinary life insurance policy issued on the standard basis, excluding any disability or accidental death benefits in the policy and to which Chapter 1105, Subchapter B, applies, the applicable mortality table is the Commissioners' 1980 Standard Ordinary Mortality Table; at the insurer's option for one or more specified life insurance plans, the Commissioners' 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors; or any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by Commissioner rule for use in determining the minimum standard valuation for a policy to which this subdivision applies. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§3.9403. 2001 CSO Preferred Class Structure Table.

(a) Policies Issued On or After January 1, 2007. At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in this subchapter, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum valuation standard for policies issued on or after January 1, 2007.

(b) Policies Issued On or After May 1, 2003, and Prior to January 1, 2007. At the election of the insurer and with the consent of the commissioner, for policies issued on or after May 1, 2003, and prior to January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum valuation standard subject to the conditions of §3.9404 of this subchapter (relating to Conditions). In determining such consent, the commissioner may rely on the consent of the commissioner of the insurer's state of domicile.

(c) Requirement to Make Election. No election in subsection (a) or (b) of this section shall be made until the insurer demonstrates that at least 20 percent of the business to be valued on this table is in one or more of the preferred classes.

(d) 2001 CSO Preferred Class Structure Mortality Table Treatment. A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, pursuant to the requirements of this subchapter, will be treated as part of the 2001 CSO Mortality Table only for purposes of reserve valuation pursuant to the requirements of §§3.9101 - 3.9106 of this chapter (relating to 2001 CSO Mortality Table).

(e) Adoption by Reference. The commissioner adopts by reference the 2001 CSO Preferred Class Structure Mortality Table. The table is available from the Actuarial Division, Texas Department of Insurance, Mail Code 302-3A, P.O. Box 149104, Austin, Texas 78714-9104 or on the internet by accessing the Department's website at www.tdi.state.tx.us/company/ficso.html.

§3.9404. Conditions.

(a) For each plan of insurance with separate rates for preferred and standard nonsmoker lives, an insurer may use the super preferred nonsmoker, preferred nonsmoker, and residual standard nonsmoker tables to substitute for the nonsmoker mortality table found in the 2001 CSO Mortality Table to determine minimum reserves. At the time of election and annually thereafter, except for business valued under the residual standard nonsmoker table, the appointed actuary shall certify that:

(1) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class; and

(2) the present value of death benefits over the future life of the contracts, using anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class.

(b) For each plan of insurance with separate rates for preferred and standard smoker lives, an insurer may use the preferred smoker and residual standard smoker tables to substitute for the smoker mortality table found in the 2001 CSO Mortality Table to determine minimum reserves. At the time of election and annually thereafter, for business valued under the preferred smoker table, the appointed actuary shall certify that:

(1) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation basic table; and

(2) the present value of death benefits over the future life of the contracts, using anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation basic table.

(c) Unless exempted by the commissioner, every insurer using the 2001 CSO Preferred Class Structure Table shall annually file with the commissioner, with the NAIC, or with a statistical agent designated by the NAIC and acceptable to the commissioner, statistical reports showing mortality and such other information as the commissioner may deem necessary or expedient for the administration of the provisions of this regulation. The form of the reports shall be established by the commissioner, or the commissioner may require the use of a form established by the NAIC or by a statistical agent designated by the NAIC and acceptable to the commissioner. The form of the statistical reports shall be promulgated by rule. Insurers are not required to file such statistical reports until such rule has been adopted by the commissioner. At the commissioner's discretion, the commissioner may request mortality experience and other information at any time.

(d) The use of the 2001 CSO Preferred Class Structure Table for the valuation of policies issued prior to January 1, 2007, shall not be permitted in any statutory financial statement in which a company reports, with respect to any policy or portion of a policy coinsured, either of the following:

(1) In cases where the mode of payment of the reinsurance premium is less frequent than the mode of payment of the policy premium, a reserve credit that exceeds, by more than the amount specified in this paragraph as Y, the gross reserve calculated before reinsurance. Y is the amount of the gross reinsurance premium that:

(A) provides coverage for the period from the next policy period premium due date to the earlier of the end of the policy year and the next reinsurance premium due date; and

(B) would be refunded to the ceding entity upon the termination of the policy.

(2) In cases where the mode of payment of the reinsurance premium is more frequent than the mode of payment of the policy premium, a reserve credit that is less than the gross reserve, calculated before reinsurance, by an amount that is less than the amount specified in this paragraph as Z. Z is the amount of gross reinsurance premium that the ceding entity would need to pay the assuming company to provide reinsurance coverage from the period of the next reinsurance premium due date to the next policy premium due date minus any liability established for the proportionate amount not remitted to the reinsurer.

(3) For purposes of the conditions stated in paragraphs (1) and (2) of this subsection, the reserve for the mean reserve method shall be defined as the mean reserve minus the deferred premium asset, and for the mid-terminal reserve method shall include the unearned premium reserve. A company may estimate and adjust its accounting on an aggregate basis in order to meet the conditions to use the 2001 CSO Preferred Class Structure Table.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005013
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: September 15, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 19. OIL SPILL PREVENTION AND RESPONSE

SUBCHAPTER F. DERELICT VESSELS AND STRUCTURES

31 TAC §§19.70 - 19.79

The General Land Office (GLO) adopts new Subchapter F, including §§19.70 - 19.79. Sections 19.73 - 19.79 are adopted without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6270) and will not be republished. Sections 19.70 and 19.71 are adopted with changes and will be republished. The new subchapter relates to the authority of the Commissioner of the GLO (Commissioner) to order the removal and disposal of an abandoned vessel or structure left in a wrecked, derelict, or substantially dismantled condition and to contract for the removal and disposal of such vessels and structures under §40.108 of the Oil Spill Prevention and Response Act of 1981, Chapter 40 of the Texas Natural Resources Code (OSPRA). This new subchapter is adopted to implement H.B. 2096 (Acts 2005, 79th Legislature, Chapter 216, effective September 1, 2005) and H.B. 3306 (Acts 2009, 81st Legislature, Chapter 1324, effective September 1, 2009).

BACKGROUND AND ANALYSIS OF ADOPTED RULES

Section 40.108 of OSPRA as amended provides the Commissioner with authority to order the removal of a derelict vessel or structure abandoned (without the consent of the Commissioner) in coastal waters where the Commissioner finds the structure or vessel to be: (1) involved in an actual or threatened unauthorized discharge of oil; (2) a threat to public health, safety, or welfare; (3) a threat to the environment; or (4) a navigation hazard. The adopted rules seek to provide definition to some of the terms found in §40.108 and to establish procedures for the findings and orders required for removal of such derelict vessels or structures.

§19.70 Applicability and Purpose

This section outlines the vessels and structures to which the new sections apply and references the fact that there has been an increase in the number of derelict and abandoned vessels that are either grounded or anchored upon publicly or privately owned submerged lands. These vessels are public nuisances and safety hazards as they often pose hazards to navigation, detract from the aesthetics of Texas coastal waterways, and threaten the environment with the potential release of oil and hazardous substances.

§19.71 Definitions

This section provides definitions for words, terms, and phrases used in the new subchapter. Key terms include the definition of "abandoned vessel" which means a vessel that has been left, moored, or anchored in the same area without the express consent, or contrary to the rules of, the owner, manager, or lessee of the submerged lands below or on which the vessel is located for either a period of more than 21 consecutive days or for more than a total of 90 days in any 365-day period, and the vessel's owner is: (a) not known or cannot be located; or (b) known and located but is unwilling to take control of the vessel. The term "authorized public entity" includes the Commissioner of the GLO or a local government with jurisdiction over submerged land on or over which a derelict vessel is located that has adopted a local ordinance relating to removal and disposal of derelict vessels and which has contracted with the Commissioner for such removal or disposal.

"Derelict structure" references other defined terms where it presents, in the Commissioner's sole determination a "threat to public health, safety or welfare." In making such determination, the Commissioner shall consider whether or not a structure: is fit for its intended purpose; is safe for its foreseeable use by the public; is hidden or not visibly apparent to the public; or possesses other characteristics or conditions which threaten public safety, health, or welfare. Similarly "derelict vessel" references a vessel that is either "wrecked" or "substantially dismantled" which are also defined terms. "Wrecked" means a vessel that is fully or partially submerged, resting fully or partially on submerged land, or is in danger of sinking. Whereas, "substantially dismantled" is defined in terms of the absence of elements required for normal transportation of the vessel, including the following: rigging; transom; helm; engine; or intact hull. "Intact hull" is also a defined term, which means a vessel that has no openings or perforations in the bottom or side below the deck. Barges do not need a functional engine or helm.

In order to justify a removal order, the Commissioner must make a finding that a derelict vessel or structure is: (1) involved in an actual or threatened unauthorized discharge of oil; (2) a threat to public health, safety, or welfare; (3) a threat to the environment; or (4) a navigation hazard. The term "threatened unauthorized discharge of oil" is defined as the condition of a derelict vessel that has either a history of an actual unauthorized discharge of oil or the presence of oil on the vessel. The term "threat to the environment" refers to the condition of a derelict vessel that has either a history of an actual release of a hazardous substance or the presence of a hazardous substance on the vessel. The term "navigation hazard" is defined as any vessel or structure that presents, in the Commissioner's sole determination, an obstruction which impedes or stops navigation; or poses an immediate and significant threat to life, property, or a structure that facilitates navigation. The term includes a vessel or structure without appropriate navigational markers or a vessel that is not moored to a dock, mooring buoy, or other appropriate navigational structure.

The term "person claiming ownership" includes an insurance company that obtains title to a vessel or structure as the result of payment of a total loss claim in addition to a person who provides evidence of ownership pursuant to these rules. The term "person responsible or responsible person" includes the owner or operator of a vessel or structure. In the case of an abandoned vessel or terminal facility, the person who would have been the responsible person immediately prior to the abandonment. The term includes a person that owns a controlling interest in the entity that is considered a person responsible. This provision allows the GLO to assess persons or entities that control an undercapitalized corporate entity with liability for removal, storage, and disposal costs of abandoned vessels or structures, as well as administrative penalties where appropriate.

"Disposal" is defined in terms of various options for disposition of a derelict vessel or structure in a reasonable and environmentally sound manner pursuant to these rules and applicable law. "Removal" means that a derelict vessel or structure must be removed from waters of the state to a secure storage area such as a VMS Site or place of disposal. The term "VMS Site" means a vessel management storage site used for the purpose of providing a means of dry-land access to vessels for removal from state waters, temporary storage, and disposal offsite after appropriate processing of the vessel. Finally, other terms including "hazardous substance," "no intrinsic value," and "numbered vessel" have the same meaning assigned by §40.003 of OSPRA.

§19.72 Authority of Authorized Public Entity

This section allows an authorized public entity (a local government with jurisdiction over the land on or over which a derelict vessel is located) that has contracted with the Commissioner, to remove and dispose of a derelict vessel within its jurisdiction in accordance with these rules. The section makes it clear that the primary responsibility to remove a derelict or abandoned vessel belongs to the owner, operator, or lessee of the moorage facility or lessee of the submerged lands where the vessel is located. An authorized public entity that contracts for the removal and disposal of derelict vessel or structure must require the contractor to maintain a policy of insurance to cover the cost of response to and removal of any unauthorized discharge of oil caused by the contractor during the removal and storage of the vessel or structure. The section also provides that nothing in this subchapter limits the authority of a municipality or law enforcement agency to remove and dispose of an abandoned motor vehicle, watercraft, or outboard motor taken into custody by the agency or the disposal under Chapter 683 of the Texas Transportation Code. Finally, the section provides that the removal authority is permissive, and no authorized public entity has a duty to exercise the authority.

§19.73 Procedures for Removal or Disposal by an Authority of Authorized Public Entity

This new section requires an authorized public entity to obtain an order for removal or disposal after notice and an opportunity for hearing as provided OSPRA before undertaking the removal or disposal action, except that the Commissioner may remove a vessel or structure involved in an actual or threatened unauthorized discharge of oil as part of a response action without a hearing. The authorized public entity must remove the derelict vessel or structure to a VMS Site unless provided otherwise in the removal order issued by the Commissioner. The rule outlines the factors to be considered by the Commissioner in determining whether removal to a VMS Site should be waived. The authorized public entity must give preference to disposal options that generate a monetary benefit from the vessel or structure. Proceeds from the sale of the vessel or structure in accordance with these rules shall be used for removal, storage, and disposal costs with any excess deposited to the credit of the coastal protection fund.

§19.74 Claim of Ownership

This new section requires a person claiming ownership of a vessel or structure prior to its disposal to demonstrate to the satisfaction of the Commissioner that the person has a lawful right to possession of the vessel or structure. Evidence must include either a sworn statement asserting ownership that details the manner in which ownership was acquired, evidence of registration or documentation from an authorized federal or state agency, or evidence of assessed value from the appropriate taxing authority. The person claiming ownership must reimburse the authorized public entity for costs incurred for the removal and storage before delivery of possession and no later than the time specified in a notice of intention to dispose of the vessel or structure. Finally, in order to discourage repeated violations, the person claiming ownership must sign an agreement not to abandon the same vessel, with the understanding that breach of such agreement will subject the person to administrative penalties not to exceed $125,000.

§19.75 Lien Holder Rights

This new section provides procedures for a person claiming the right to possession as a lien holder of a vessel or structure subject to removal or disposal to obtain possession of the vessel or structure prior to its disposal to protect the security interest of the lien holder. If the Commissioner has actual knowledge of the security interest, notice must be given to the person in the same manner provided by Texas Natural Resources Code §40.254 with a reasonable time specified in the preliminary report for removal of the vessel or structure. However, the GLO has no obligation to check lien records. Although the lien holder is not considered a responsible party liable for the removal costs, it may undertake removal of the vessel in order to protect the collateral. In addition, the interest of the state in recovering removal, storage, and disposal costs shall have priority by statute over the interest of the holder of a security interest in a vessel or structure, and those costs must be paid prior to delivery of possession of the vessel or structure to the lien holder. Salvage sale proceeds in excess of the cost of removal, storage, and disposal must be paid to the lien holder to the extent necessary to satisfy the secured debt.

§19.76 Sale of Derelict Vessel or Structure

This new section allows an authorized public entity to sell a vessel or structure that is the subject of a removal action as provided by law, if possession of the vessel is not claimed by the owner or lien holder. The owner or lien holder who fails to claim possession and pay removal costs waives all rights and interests in the vessel or structure and consents to the sale or transfer of the item by the authorized public entity. The purchaser takes title free and clear of all liens and claims of ownership and is entitled to register the vessel and apply for a certificate of title from Texas Parks and Wildlife Department for the vessel as property seized by a governmental entity. Finally, the purchaser of the vessel or structure must sign an agreement not to abandon the same vessel, with the understanding that breach of such agreement will subject the person to administrative penalties not to exceed $125,000. This is intended to discourage the purchaser from stripping the vessel of usable parts and abandoning the vessel again.

§19.77 Disposal of Derelict Vessel or Structure

This new section allows an authorized public entity to contract for the transportation and disposal of waste generated from the removal of a vessel or structure with no intrinsic value to an authorized landfill, recycling center, or hazardous waste management facility. The authorized public entity may disqualify a potential disposal contractor from consideration for award of a disposal contract if the credit for salvage, if any, is not stated separately. The purpose of this provision is to meet the statutory requirement of using the least costly method of disposal. The authorized public entity may also require the contractor to provide copies of manifests, run tickets, invoices, or other written documentation that shows the name and address of the waste disposal facility and the date the waste was transported to it.

This new section also allows the authorized public entity to transfer a watercraft that is not claimed by the owner or lien holder to the Texas Parks and Wildlife Department for use as part of an artificial reef under Chapter 89, Texas Parks and Wildlife Code, only with the consent of the department.

§19.78 Determination of No Intrinsic Value

This new section establishes criteria for a determination by the Commissioner that a vessel or structure subject to a removal action has "no intrinsic value." The determination that a vessel or structure has no intrinsic value is relevant to whether personal service of the notice provided by Texas Natural Resources Code §40.254 is required. The determination of no intrinsic value also allows the Commissioner to waive the requirement of removal to a VMS Site prior to disposal. The factors considered by the Commissioner include the condition of the vessel or structure, the cost for removal relative to the salvage value of the vessel or structure, and the cost of conducting a sale to a third party relative to the salvage value of the vessel.

§19.79 Prioritization of Derelict Vessel and Structure Removal

This new section establishes factors the Commissioner may consider in determining the priority for removal of a derelict vessel or structure. These factors are not listed in any order of importance and include consideration of the nature and seriousness of the threat posed by the vessel or structure, local government and private financial participation in the removal project (including in-kind contributions), and, most importantly, the availability of appropriated funds. In order to encourage local government adoption of an ordinance relating to removal and disposal of derelict vessels, the Commissioner may consider such a local ordinance in prioritizing removal projects.

RESPONSE TO PUBLIC COMMENT

No public comments were received regarding the adopted new sections.

FACTUAL BASIS AND REASONED JUSTIFICATION FOR ADOPTION OF NEW SECTIONS

The justification for the adopted new rules provide for a more efficient procedure for identification, notice to owners and lien holders, findings, hearings, and orders for removal, and disposal of derelict vessels and structures. The adopted new rules allow the Commissioner to prioritize removal projects and respond to those derelict vessels and structures that pose the most severe threat to public health, safety, and welfare, as well as the environment. The rules also encourage local government and private participation in removal projects, which will benefit the public as well.

In addition, the new sections provide due process notice to owners and holders of a security interest in derelict structures and vessels, but ensure that the state has priority for recovery of removal, storage, and disposal costs to limit the expenditure of public funds. The rules also establish procedures requiring the

Commissioner to give preference to a disposal method that generates a monetary benefit to the state or, where no value may be generated, the least costly method to further limit the expenditure of public funds. Requiring prospective disposal contractors to separately state the salvage credit, if any, allows the Commissioner to select the least costly method. By including in the definition of "person responsible or responsible person" those persons that have a controlling interest in the entity that is considered a person responsible, the GLO will be able to assess persons or entities that control an undercapitalized corporate entity with liability for removal, storage, and disposal costs of abandoned vessels or structures. This will also limit the expenditure of public funds for removal projects.

Finally, the new sections ensure that disposal of waste generated from the removal of a vessel or structure with no intrinsic value is undertaken in an environmentally sound manner by transportation to an authorized landfill, recycling center, or hazardous waste management facility in accordance with Chapter 361 Texas Health and Safety Code.

CONSISTENCY WITH CMP

The adopted new rules concerning procedures for identification, notice to owners and lien holders, findings, hearings, and orders for removal, and disposal of derelict vessels and structures implement §40.108 of OSPRA as amended by H.B. 2096 and H.B. 3306 and are not subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. Therefore, consistency review is not required.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adopted new rules are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rulemaking implements legislative requirements in Texas Natural Resources Code §40.108 and §40.254. These sections as amended by H.B. 2096 and H.B. 3306, provide the GLO with the authority to adopt rules for identification, notice to owners and lien holders, findings, hearings, and orders for removal, and disposal of derelict vessels and structures.

STATUTORY AUTHORITY

The new sections are adopted under OSPRA, Texas Natural Resources Code, §40.007(a), which gives the Commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA, and §40.108(e), which authorizes the Commissioner of the GLO to adopt regulations relating to a system for prioritizing the removal or disposal of derelict vessels or structures.

Texas Natural Resources Code §40.108 and §40.254 are affected and implemented by the adopted new rules.

§19.70. Applicability and Purpose.

(a) Applicability. This subchapter applies to any structure or vessel in or on coastal waters, on public or private lands or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition.

(b) Purpose. There has been an increase in the number of derelict and abandoned vessels that are either grounded or anchored upon publicly or privately owned submerged lands. These vessels are public nuisances and safety hazards as they often pose hazards to navigation, detract from the aesthetics of Texas coastal waterways, and threaten the environment with the potential release of oil and hazardous substances. The costs associated with the disposal of derelict and abandoned vessels are substantial, and in many cases there is no way to track down the current vessel owners in order to seek compensation. As a result, the costs associated with the removal of derelict vessels becomes a burden on public entities and the taxpaying public. This subchapter is adopted to implement H.B 2096 (Acts 2005, 79th Legislature, Chapter 216, effective September 1, 2005) and H.B. 3306 (Acts 2009, 81st Legislature, Chapter 1324, effective September 1, 2009).

§19.71. Definitions.

The following words, terms and phrases, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other terms are defined in §19.2 of this title (relating to Definitions).

(1) Abandoned vessel--A vessel that has been left, moored, or anchored in the same area without the express consent, or contrary to the rules of, the owner, manager, or lessee of the submerged lands below or on which the vessel is located for either a period of more than 21 consecutive days or for more than a total of ninety days in any three hundred sixty-five-day period, and the vessel's owner is:

(A) Not known or cannot be located; or

(B) Known and located but is unwilling to take control of the vessel. For the purposes of this subchapter only, "in the same area" means within a radius of five miles of any location where the vessel was previously moored or anchored on submerged lands.

(2) Authorized public entity--The commissioner of the General Land Office or a local government with jurisdiction over submerged land on or over which a derelict vessel is located that has adopted a local ordinance relating to removal and disposal of derelict vessels and has contracted with the commissioner for such removal or disposal.

(3) Derelict structure--Any structure or facility in or on coastal waters that presents, in the commissioner's sole determination, an imminent and unreasonable threat to public health, safety or welfare.

(4) Derelict vessel--A vessel that is either wrecked or in a substantially dismantled condition.

(5) Disposal--Disposition of a derelict vessel or structure in a reasonable and environmentally sound manner. The term includes:

(A) delivery of possession to a person claiming ownership in accordance with §19.74 of this title (relating to Claim of Ownership);

(B) delivery of possession to a lien holder claiming a right to possession in accordance with §19.75 of this title (relating to Lien Holder Rights);

(C) sale to a third party in accordance with §19.76 of this title (relating to Sale of Derelict Vessel or Structure);

(D) transportation of waste generated from the removal of a vessel or structure with no intrinsic value to an authorized landfill,

recycling center, or hazardous waste management facility for in accordance with Chapter 361 Texas Natural Resources Code.

(6) Hazardous substance--Any substance, except oil, designated as hazardous by the Environmental Protection Agency pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9601 et seq.) and designated by the Texas Commission on Environmental Quality.

(7) Intact hull--A vessel that has no openings or perforations in the bottom or side below the deck.

(8) Lien holder--The holder of a security interest in a vessel or structure created by statute or contract to secure the payment of a debt or performance of some other obligation, where the security interest is perfected in accordance with the laws of this State or some other jurisdiction.

(9) Navigation hazard--Any vessel or structure that presents, in the commissioner's sole determination, an obstruction which impedes or stops navigation; or poses an immediate and significant threat to life, property, or a structure that facilitates navigation. The term includes a vessel or structure without appropriate navigational markers or a vessel that is not moored to a dock, mooring buoy, or other appropriate navigational structure.

(10) No intrinsic value--The condition of a vessel or structure where the cost of removal and disposal of a vessel or structure that has been abandoned or left in or on coastal waters exceeds the salvage value of the vessel or structure.

(11) Numbered vessel--A vessel:

(A) for which a certificate of number has been awarded by this state as required by Chapter 31, Texas Parks and Wildlife Code; or

(B) covered by a number in full force and effect awarded under federal law or a federally approved numbering system of another state.

(12) Person claiming ownership--A person listed as the last known owner of a numbered vessel or who provides evidence of ownership as provided in §19.72 of this title (relating to Authority of Authorized Public Entity). The term includes an insurance company that obtains title to a vessel or structure as the result of payment of a total loss claim.

(13) Person responsible or responsible person--The owner or operator of a vessel or structure. In the case of an abandoned vessel or terminal facility, the person who would have been the responsible person immediately prior to the abandonment. The term includes a person that owns a controlling interest in the entity that is considered a person responsible.

(14) Removal--The removal of a derelict vessel or structure from waters of the state to a secure storage area or place of disposal.

(15) Substantially dismantled--A vessel that lacks any of the following elements:

(A) rigging;

(B) transom;

(C) helm;

(D) engine; or

(E) intact hull. For purposes of this subchapter only, a barge constructed and used for the transportation of cargo does not require a functional helm or engine, provide that is not wrecked or abandoned.

(16) Threatened unauthorized discharge of oil--The condition of a derelict vessel that has either a history of an actual unauthorized discharge of oil or the presence of oil on the vessel.

(17) Threat to public health, safety, or welfare--Any vessel or structure in or on coastal waters which presents, in the commissioner's sole determination, an imminent and unreasonable threat to public health, safety or welfare. In making such determination, the commissioner shall consider whether or not a structure or facility:

(A) is fit for its intended purpose;

(B) is safe for its foreseeable use by the public;

(C) is hidden or not visibly apparent to the public; or

(D) possesses other characteristics or conditions which threaten public safety, health, or welfare.

(18) Threat to the environment--The condition of a derelict vessel that has either a history of an actual release of a hazardous substance or the presence of a hazardous substance on the vessel.

(19) VMS Site--A vessel management storage site used for the purpose of providing a means of dry-land access to vessels for removal from state waters, temporary storage, and disposal offsite after appropriate processing of the vessel.

(20) Wrecked--A vessel that is fully or partially submerged, resting fully or partially on submerged land, or is in danger of sinking.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2010.

TRD-201004939
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: September 13, 2010
Proposal publication date: July 16, 2010
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER I. VALIDATION PROCEDURES

34 TAC §9.4035

The Comptroller of Public Accounts adopts an amendment to §9.4035, concerning special types of personal property inventory, without changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6495).

This section is being amended to conform to applicable statutory provisions and to increase administrative efficiency by providing for comptroller revision of applicable forms. The proposed amendment is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter I, conducted by the

comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §9.4035 continue to exist.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Government Code, §2001.039(c), which authorizes the readoption of a rule with amendments upon agency assessment, in conducting a rule review, of whether the reasons for initially adopting the rule continue to exist.

This amendment implements Tax Code, §§23.121, 23.122, 23.124, 23.1241, 23.1242, 23.125, 23.127, and 23.128.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 30, 2010.

TRD-201005099
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: September 19, 2010
Proposal publication date: July 23, 2010
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL
SUBCHAPTER A. CRASH INVESTIGATIONS

37 TAC §3.1, §3.4

The Texas Department of Public Safety (the department) adopts the amendments to §3.1 and §3.4, concerning Crash Investigations, without changes to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5793).

The adoption of these amendments are necessary to provide guidance to the Texas Highway Patrol and the department's regional commanders for using limited resources in public places outside highways (such as parking lots).

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005010
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: September 15, 2010
Proposal publication date: July 2, 2010
For further information, please call: (512) 424-5848

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CHAPTER 35. PRIVATE SECURITY
SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.291

The Texas Department of Public Safety (the department) adopts amendments to §35.291, concerning Mandatory Continuing Education Courses, without changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3965).

The adoption of the amendments is necessary in order to modify the continuing education requirement for licensed locksmiths.

No comments were received regarding the adoption of these amendments.

The amendments are adopted under Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005011
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: September 15, 2010
Proposal publication date: May 21, 2010
For further information, please call: (512) 424-5848

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PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 141. GENERAL PROVISIONS
SUBCHAPTER A. BOARD OF PARDONS AND PAROLES

37 TAC §141.5

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §141.5, concerning parliamentary authority. The amendment is adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3455). The text of the rule will not be republished.

The amendment is adopted to clarify the Chair's requirement to sign a board policy.

No public comments were received regarding adoption of the amendment to this rule.

The amended rule is adopted under §508.035 and §508.036, Texas Government Code. Section 508.035 requires the presiding officer to establish policies and procedures to further the efficient administration of the business of the board; and §508.036 authorizes the board to adopt rules relating to the decision-making processes used by the board and parole panels.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005070
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: September 16, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 406-5388

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SUBCHAPTER C. SUBMISSION AND PRESENTATION OF INFORMATION AND REPRESENTATION OF OFFENDERS

37 TAC §141.61

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §141.61, concerning representation of an offender. The amendment is adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3456). The text of the rule will not be republished.

The amendment is adopted to clarify that the parole panel designated to consider an offender's case is who a representative of the offender shall appear before.

No public comments were received regarding adoption of the amendment to this rule.

The amended rule is adopted under §508.082, and §508.083, Government Code. Section 508.082 requires the board to adopt rules relating to the submission and presentation of information and arguments to the board, a parole panel, and the department for and in behalf of an inmate. Section 508.083 relates to representation of an inmate in a matter before the board or a parole panel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2010.

TRD-201005071
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: September 16, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 406-5388

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SUBCHAPTER D. REGISTRATION OF VISITORS AND FEE AFFIDAVITS

37 TAC §141.81

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §141.81, concerning registration of visitors. The amendment is adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3456). The text of the rule will not be republished.

The amendment is adopted to clarify the reference to a hearing as preliminary or revocation.

No public comments were received regarding adoption of the amendment to this rule.

The amended rule is adopted under §508.036, and §2004.002, Government Code. Section 508.036 authorizes the board to adopt rules relating to the decision-making processes used by the board and parole panel. Section 2004.002 relates to an individual who appears before a state agency or contacts in person an officer or employee of a state agency on behalf of an individual, firm, partnership, corporation, or association about a matter before that agency shall register with the state agency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
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For further information, please call: (512) 406-5388

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SUBCHAPTER G. DEFINITION OF TERMS

37 TAC §141.111

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §141.111, concerning definition of terms. The amendments are adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3457). The text of the rule will not be republished.

The amendments are adopted to include preliminary hearings to the definition of hearing officer and to amend the definition of victim as defined under the Texas Code of Criminal Procedure, Article 56.01 §3.

No public comments were received regarding adoption of the amendments to this rule.

The amended rule is adopted under §508.036, Government Code and the Texas Code of Criminal Procedure, Article 56.01 §3. Section 508.036 requires the board to adopt rules relating to the decision-making processes used by the board and parole panels. Article 56.01 §3 defines victim.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201005074
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
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For further information, please call: (512) 406-5388

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CHAPTER 143. EXECUTIVE CLEMENCY
SUBCHAPTER B. CONDITIONAL PARDON

37 TAC §143.20

The Texas Board of Pardons and Paroles adopts new §143.20, concerning posthumous pardon. The new rule is adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3457). The text of the rule will not be republished.

The proposed new rule is adopted to allow the board to consider a recommendation for a full pardon on behalf of a deceased individual.

No public comments were received regarding adoption of this proposed new rule.

The new rule is adopted under §508.035, Government Code and Attorney General Opinion GA-0754. Section 508.035 requires the presiding officer to establish policies and procedures to further the efficient administration of the business of the board. The Attorney General Opinion GA-0754 provides the board with the authority to recommend a posthumous pardon to the Governor.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
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For further information, please call: (512) 406-5388

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT
SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §1.86, §1.87

The Texas Department of Transportation (department) adopts new §1.86, Corridor Advisory Committees, and §1.87, Corridor Segment Advisory Committees, concerning transportation planning. The new sections are adopted in association with the repeal of 43 TAC §15.9 and §15.10. New §1.86 and §1.87 are adopted without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4970) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

43 TAC §15.9, Corridor Advisory Committees, was adopted in December, 2007 to provide the commission with the authority to create advisory committees to assist the department in the transportation planning process for transportation corridors in the state. Section 15.10, Corridor Segment Advisory Committees, was adopted in December, 2009 to provide the commission with similar authority for advisory committees for corridor segments. The purpose of such an advisory committee would be to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the corridor or corridor segment for which it is created and in the establishment of development plans for that corridor or segment.

Both §15.9 and §15.10 relate to the transportation planning process and initially were placed in 43 TAC Chapter 15, Subchapter A, Transportation Planning. On July 30, 2009, the Texas Transportation Commission (commission) created the Transportation Planning and Project Development Rulemaking Advisory Committee (rules advisory committee) to address some of the recommendations made by the legislature in the department's sunset bill that was considered in the 2009 legislative session. The rules advisory committee considered drafts of revisions of the commission's rules relating to the department's transportation planning and programming process and in May, 2010 voted to recommend a draft for commission adoption. Under the revision, 43 TAC Chapter 15, Subchapters A and D will be repealed and most of their substance will be revised and placed in a new chapter which will provide the transportation planning and programming rules. As a part of the repeal of 43 TAC Chapter 15, Subchapter A, the commission adopts the repeal of §15.9 and §15.10 and simultaneously adopts them, without substantive revision, as new §1.86 and §1.87 in 43 TAC Chapter 1, Subchapter F, Advisory Committees rather than place them in the new chapter.

The repeal of §15.9 and §15.10, coupled with the associated adoption of new §1.86 and §1.87, will not change the substance of the existing rules of the commission, other than to renumber §15.9 and §15.10 as §1.86 and §1.87. The placement of those rules in 43 TAC Chapter 1, Subchapter F will allow the grouping of rules that relate to the organization and duties of all advisory committees of the commission and department into that subchapter.

COMMENTS

No comments on the proposed new sections were received.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, Transportation Code, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Transportation Code, Chapter 227, and Government Code, Chapter 2110, which requires a state agency establishing an

advisory committee to by rule state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 201 and 227, and Government Code, Chapter 2110.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201005038
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: September 15, 2010
Proposal publication date: June 11, 2010
For further information, please call: (512) 463-8683

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CHAPTER 13. MATERIALS QUALITY
SUBCHAPTER A. GENERAL

43 TAC §13.7

The Texas Department of Transportation (department) adopts new §13.7, New Product Evaluation, concerning research and planning contracts. The new section is adopted in association with the repeal of 43 TAC §15.13. New §13.7 is adopted without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4972) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

43 TAC §15.13, New Product Evaluation, was adopted to provide procedures for the evaluation of new products and processes that may benefit the department. The department is repealing §15.13 and adopting it as new §13.7, with minor clarifying language added to the new section. This reorganization will allow the grouping of rules that relate to product testing and quality under the Materials Quality chapter, Chapter 13.

The repeal of §15.13 and its simultaneous adoption as new §13.7 create a more cohesive organization of subject matter in the rules. Existing §15.13 describes the procedure for how individuals and entities may submit new products to the department for evaluation and potential use by the department and its contractors. The adoption of new §13.7 incorporates all the sections that relate to product testing into the same chapter.

COMMENTS

No comments on the proposed new section were received.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

The Texas Department of Transportation (department) adopts the repeal of §15.1, Purpose, Applicability, and Scope, §15.2, Definitions, §15.3, Organization, Structure, and Responsibilities of Metropolitan Planning Organizations, §15.4, Unified Planning Work Program (UPWP), §15.5, Metropolitan Planning Process, §15.6, Metropolitan Transportation Plan, §15.7, Transportation Improvement Program (TIP), §15.8, Statewide Transportation Improvement Program (STIP), §15.21, Distribution and Availability, §15.40, Purpose, §15.41, Definitions, and §15.42, Selection Criteria, all concerning transportation planning and programming. The repeals of §§15.1 - 15.8, 15.21, and 15.40 - 15.42 are adopted without changes to the proposal as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4973) and will not be republished.

EXPLANATION OF ADOPTED REPEALS

Currently, the department has transportation planning and programming rules in 43 TAC Chapter 15, Subchapter A, Transportation Planning, and Subchapter D, Texas Highway Trunk System. Those rules focus primarily on the federal planning and programming requirements applicable to metropolitan planning organizations under 23 C.F.R. Parts 420 and 450. Before the Regular Session of the Texas Legislature in 2009, the Sunset Advisory Commission made several recommendations for legislation that would have required the department to develop a continuing, cooperative, and comprehensive transportation planning and programming process for all modes of transportation involving all transportation stakeholders. The recommendations of the Sunset Advisory Commission report were incorporated in the transportation planning article of the department's sunset bill, House Bill (HB) 300. Although HB 300 was not enacted, the concepts expressed in the Conference Committee Report for the bill provide a basis for revisions to the department's existing planning and project development program.

On July 30, 2009, the Texas Transportation Commission (commission) created the Transportation Planning and Project Development Rulemaking Advisory Committee (rules advisory committee) comprised of 11 members, including representatives from large metropolitan planning organizations, small metropolitan planning organizations, counties, transit organizations, tolling authorities, small cities, councils of governments, and the Federal Highway Administration. The rules advisory committee met five times with department staff to give advice, review draft proposals, and make specific recommendations. The

department also solicited public comments on the draft rules. On May 4, 2010, with eight members present, the rules advisory committee unanimously recommended that the commission propose the draft rules.

The changes repeal 43 TAC Chapter 15, Subchapter A, Transportation Planning and Subchapter D, Texas Highway Trunk System. The development of rules for a comprehensive approach to transportation planning, programming, funding, and performance reporting requires a significant expansion of the provisions in those subchapters. In order to consolidate and expand those provisions, it is necessary to repeal Subchapters A and D and simultaneously adopt new Chapter 16, Planning and Development of Transportation Projects. The provisions currently in 43 TAC Chapter 15, Subchapters A and D are being incorporated into new 43 TAC Chapter 16, Subchapters A - C.

The amendments also repeal 43 TAC Chapter 15, Subchapter C, Distribution and Availability of Data. The subchapter consists of one section, §15.21, Distribution and Availability, which was adopted to establish a procedure for charging government agencies and private entities and individuals for maps, reports, and regularly published statistical data requested from the department. The repeal of §15.21 deletes language that has become superfluous because of other law or that conflicts with other law. Requests by private organizations, companies, or individuals for maps, reports, or statistical data are subject to the Public Information Act (Government Code, Chapter 552). When the department provides requested information, the requestor is charged according to a fee schedule established by the Office of the Attorney General under Government Code, §552.262 and contained in 1 TAC §70.10. Section 15.21 also makes a potentially misleading distinction between materials that are regularly published and those that are not. The Public Information Act applies to both types of materials, and if the materials are public information, the department is generally required to make copies of it regardless of the interference to the normal operations of the division in charge of the information.

Additionally, Transportation Code, §204.002 requires the department to provide a single copy of a travel document or map distributed under Transportation Code, §204.001 free of charge. Documents and maps created under Transportation Code, §204.001 include those that provide information about highways, parks, historical facts, and other relevant matters of interest to the traveling public. The repeal of §15.21 eliminates the confusion over whether a map or document must be provided without charge or according to the price schedule. The department may also furnish maps, reports, and statistics, as well as other types of information, to other government agencies without necessarily invoking the Public Information Act and may charge for those items at its discretion. The repeal of §15.21 reflects the fact that some intergovernmental transfers are subject to the fee schedule, while others are not.

COMMENTS

No comments on the proposed repeals were received.

SUBCHAPTER A. TRANSPORTATION PLANNING

43 TAC §§15.1 - 15.8

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 201, Subchapters H, I, and J.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005040
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 1, 2011
Proposal publication date: June 11, 2010
For further information, please call: (512) 463-8683

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SUBCHAPTER C. DISTRIBUTION AND AVAILABILITY OF DATA

43 TAC §15.21

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 201, Subchapters H, I, and J.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 1, 2011
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For further information, please call: (512) 463-8683

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SUBCHAPTER D. TEXAS HIGHWAY TRUNK SYSTEM

43 TAC §§15.40 - 15.42

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 201, Subchapters H, I, and J.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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Proposal publication date: June 11, 2010
For further information, please call: (512) 463-8683

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SUBCHAPTER A. TRANSPORTATION PLANNING

43 TAC §15.9, §15.10

The Texas Department of Transportation (department) adopts the repeal of §15.9 and §15.10, concerning Corridor Advisory Committees and Corridor Segment Advisory Committees. The repeal of §15.9 and §15.10 is adopted in association with the adoption of new 43 TAC §1.86 and §1.87. The repeals of §15.9 and §15.10 are adopted without changes to the proposal as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4975) and will not be republished.

EXPLANATION OF ADOPTED REPEALS

43 TAC §15.9, Corridor Advisory Committees, was adopted in December, 2007 to provide the commission with the authority to create advisory committees to assist the department in the transportation planning process for transportation corridors in the state. Section 15.10, Corridor Segment Advisory Committees, was adopted in December, 2009 to provide the commission with similar authority for advisory committees for corridor segments. The purpose of such an advisory committee would be to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the corridor or corridor segment for which it is created and in the establishment of development plans for that corridor or segment.

Both §15.9 and §15.10 relate to the transportation planning process and initially were placed in 43 TAC Chapter 15, Subchapter A, Transportation Planning. On July 30, 2009, the Texas Transportation Commission (commission) created the Transportation Planning and Project Development Rulemaking Advisory Committee (rules advisory committee) to address some of the recommendations made by the legislature in the department's sunset bill that was considered in the 2009 legislative session. The rules advisory committee considered drafts of revisions of the commission's rules relating to the department's transportation planning and programming process and in May, 2010 voted to recommend a draft for commission adoption. Under the revision, 43 TAC Chapter 15, Subchapters A and D will be repealed and most of their substance will be revised and placed in a new chapter which will provide the transportation planning and programming rules. As a part of the repeal of 43 TAC Chapter 15, Subchapter A, the commission is repealing §15.9 and §15.10 and simultaneously adopting them, without substantive revision, as new §1.86 and §1.87 in 43 TAC Chapter 1, Subchapter F, Advisory Committees rather than place them in the new chapter.

The repeal of §15.9 and §15.10, coupled with the associated adoption of §1.86 and §1.87, will not change the substance of the existing rules of the commission, other than to renumber §15.9 and §15.10 as §1.86 and §1.87. The placement of those rules in 43 TAC Chapter 1, Subchapter F will allow the grouping of rules that relate to the organization and duties of all advisory committees of the commission and department into that subchapter.

COMMENTS

No comments on the proposed repeals were received.

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, Transportation Code, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Transportation Code, Chapter 227, and Government Code, Chapter 2110, which requires a state agency establishing an advisory committee to by rule state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 201 and 227, and Government Code, Chapter 2110.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER B. RESEARCH AND PLANNING CONTRACTS

43 TAC §15.13

The Texas Department of Transportation (department) adopts the repeal of §15.13, New Product Evaluation, concerning research and planning contracts. The repeal is adopted in association with the adoption of new 43 TAC §13.7. The repeal of §15.13 is adopted without changes to the proposal as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4976) and will not be republished.

EXPLANATION OF ADOPTED REPEAL

Section 15.13, New Product Evaluation, was adopted to provide procedures for the evaluation of new products and processes that may benefit the department. The department adopts the repeal of §15.13 and adopts it as new 43 TAC §13.7 in Chapter 13. This reorganization will allow the grouping of rules that relate

to product testing and quality under the Materials Quality chapter, Chapter 13.

The repeal of §15.13 and its simultaneous adoption as new §13.7 creates a more cohesive organization of subject matter in the rules. Existing §15.13 describes the procedure for how individuals and entities may submit new products to the department for evaluation and potential use by the department and its contractors. The adoption of new §13.7 incorporates all the sections that relate to product testing into the same chapter.

COMMENTS

No comments on the proposed repeal were received.

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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CHAPTER 16. PLANNING AND DEVELOPMENT OF TRANSPORTATION PROJECTS

The Texas Department of Transportation (department) adopts new Chapter 16, Planning and Development of Transportation Projects, Subchapter A, General Provisions, §§16.1 - 16.4, Subchapter B, Transportation Planning, §§16.51 - 16.56, Subchapter C, Transportation Programs, §§16.101 - 16.105, Subchapter D, Transportation Funding, §§16.151 - 16.160, and Subchapter E, Project and Performance Reporting, §§16.201 - 16.205, all concerning the transportation planning and programming process for development of projects on the state highway system and projects involving other modes of transportation. New §§16.1 - 16.4, 16.51 - 16.56, 16.101 - 16.105, 16.151 - 16.160, and 16.201 - 16.205 are adopted without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4977) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

Currently, the department has transportation planning and programming rules in 43 TAC Chapter 15, Subchapter A, Transportation Planning, and Subchapter D, Texas Highway Trunk System. Those rules focus primarily on the federal planning and programming requirements applicable to metropolitan planning organizations under 23 C.F.R. Parts 420 and 450. Before the Regular Session of the Texas Legislature in 2009, the Sunset Advisory Commission made several recommendations for legislation that would require the department to develop a continuing, cooperative, and comprehensive transportation planning and programming process that includes all modes of transportation and involves all transportation stakeholders. The recommendations of the Sunset Advisory Commission report were incorporated in the transportation planning article of the department's sunset bill, House Bill (HB) 300. Although HB 300 was not enacted, the concepts expressed in the Conference Committee Report for the bill provide a basis for revisions to the department's existing planning and project development program.

On July 30, 2009, the Texas Transportation Commission (commission) created the Transportation Planning and Project Development Rulemaking Advisory Committee (rules advisory committee) to be comprised of eleven members, including representatives from large metropolitan planning organizations, small metropolitan planning organizations, counties, transit organizations, tolling authorities, small cities, councils of governments, and the Federal Highway Administration. The rules advisory committee met five times with department staff to render advice, review draft proposals and make specific recommendations. In addition to the rules advisory committee, the department solicited public comments on the draft rules. On May 4, 2010, with eight members present, the rules advisory committee unanimously recommended that the commission propose these rules.

Development of rules for a comprehensive approach to transportation planning, programming, funding, and performance reporting requires a significant expansion of the existing rules in Chapter 15, Subchapters A and D. In order to consolidate and expand those provisions, it is necessary to repeal the current provisions for planning and programming in Chapter 15 and simultaneously adopt new Chapter 16, Planning and Development of Transportation Projects. New Subchapter A, General Provisions, Subchapter B, Transportation Planning, and Subchapter C, Transportation Programs, incorporate both the existing requirements of Chapter 15, Subchapters A and D, and additional requirements that are necessary to provide a detailed, coordinated, and comprehensive planning and programming process. New Subchapter D, Transportation Funding, contains all new provisions that are necessary to develop reliable financial assumptions and forecasts for common use by all participants in the planning and programming process, and to provide for a fair and balanced allocation of available state and federal resources to department districts, metropolitan planning organizations, and other authorized entities in order to fund individual projects. New Subchapter E, Project and Performance Reporting, contains provisions that are necessary to establish strategic performance measures and a reporting system that is used to monitor and evaluate the effectiveness of the planning and programming process and to identify areas that need improvement.

Subchapter A, General Provisions, incorporates the existing provisions of §15.1, Purpose, Applicability, and Scope (now §16.1 and §16.3); and §15.2, Definitions (now §16.2). It adds a new Introduction section (§16.4) that summarizes the planning and programming process, identifies its component parts, and describes the relationship among the department and both metropolitan and rural planning organizations.

Section 16.1, Purpose, identifies the purpose of the chapter as providing minimum standards for transportation planning and program development, describing how the state and planning

organizations will develop coordinated processes, plans, and programs, and ensuring the eligibility of the state to continue to receive federal transportation funds. The goal is to establish a transparent, well-defined, and understandable system of planning and programming. This section incorporates the existing provisions of §15.1(a) with only minor non-substantive changes.

Section 16.2(a), Definitions, incorporates most of the existing definitions of §15.2 either with their existing language or with only minor non-substantive changes, deletes some of the existing definitions that are no longer necessary, and adds new definitions to provide clarity to the chapter's provisions.

The definitions in §16.2(a)(2) "Commission," (5) "Department," (9) "Executive director," (11) "Federal Highway Administration (FHWA)," (12) "Federal Transit Administration (FTA)," (13) "Governor," (28) "Texas Commission on Environmental Quality (TCEQ)," (30) "Transportation control measure (TCM)," and (33) "Unified Planning Work Program (UPWP)" are identical to the existing definitions in §15.2.

The definitions in §16.2(a)(1) "Clean Air Act (CAA)," (3) "Conformity," (4) "Corridor," (6) "District," (8) "Environmental Protection Agency (EPA)," (10) "Federal discretionary programs," (16) "Metropolitan planning organization (MPO)," (24) "Rural transportation improvement program (RTIP)," (26) "Subarea," and (27) "Surface Transportation Program (STP)" incorporate the language and concepts of the existing definitions in §15.2 with only minor non-substantive changes.

The existing definition in §15.2(13) "Major revision" is deleted and not included in §16.2(a) because it is no longer a distinction in federal regulations governing the plans and programs of metropolitan planning organizations. The existing definition in §15.2(15) "Metropolitan planning organization policy board" is deleted and not included in §16.2(a) because the concept and function of the policy board is consolidated with the definition of the organization in the revised definition of (16) "Metropolitan planning organization (MPO)." The existing definition in §15.2(22) "Trans-Texas Corridor" is deleted and not included in §16.2(a) because the department is no longer using that concept in its planning and programming process.

Section 16.2(a)(7) defines "District engineer" as the chief administrative officer in charge of a department district, or his or her designee and is consistent with the definition used in other chapters of 43 TAC Part 1.

Section 16.2(a)(14) defines "Letting" as the official act of opening contractors' bids for a proposed highway improvement contract to construct, reconstruct, or maintain a segment of the state highway system. The term is necessary to identify a point in time that marks the beginning of the construction phase of a project.

Section 16.2(a)(15) defines "Local transportation entity" as an entity that participates in the transportation planning process. The definition provides examples of eligible entities but the examples are not exclusive. Examples include metropolitan planning organizations, rural planning organizations, toll authorities, transit authorities, and rail districts.

Section 16.2(a)(17) defines "Mexican ports of entry" as connections between Mexico and the State of Texas at international bridge crossings of 5,000 vehicles or more average daily traffic. It is identical to the existing definition in §15.41(4) and is a necessary term in describing the selection criteria for routes to be included in the Texas Highway Trunk System in §16.56.

Section 16.2(a)(19) defines "On-system" as the state highway system as approved by the commission in accordance with Transportation Code, §201.103. The term is used as a distinguishing factor in the description of several allocation funding formulas in §16.154.

Section 16.2(a)(20) defines "Planning organization" as a metropolitan planning organization, rural planning organization, or a district for an area that is not in the boundaries of either a metropolitan planning organization or rural planning organization.

Section 16.2(a)(21) defines "Public transportation" as the transportation of passengers and their hand carried packages on a regular or continuing basis by means of surface or water conveyance by either a governmental or private entity that receives financial assistance from a governmental entity. The term is used throughout the chapter to identify mass transportation and transit entities and is consistent with federal regulations.

Section 16.2(a)(22) defines "Routes" as all or a portion of a selected course of travel between two specific geographic locations. It is similar to the existing definition in §15.41(5) and is a necessary term in describing the selection criteria for routes to be included in the Texas Highway Trunk System in §16.56.

Section 16.2(a)(23) defines "Rural planning organization (RPO)" as a voluntary organization created and governed by local elected officials with responsibility for transportation decisions at the local level. It is recognized in this chapter as a valid planning organization and may address rural transportation priorities and planning and provide recommendations to the department for areas of the state not included in the boundaries of a metropolitan planning organization.

Section 16.2(a)(25) defines "State Implementation Plan (SIP)" as the latest approved version of the state adopted plan promulgated for each nonattainment or maintenance area to achieve or maintain compliance with national ambient air quality standards required by the federal Clean Air Act. It is one of the benchmarks used in satisfying federal regulations during the planning and programming process.

Section 16.2(a)(29) defines "Texas Highway Trunk System" as a rural network of four-lane or better divided highways that will serve as a principal connector of all Texas cities with over 20,000 population as well as major ports and points of entry. It is identical to the existing definition in §15.41(6) and is a necessary term in describing the selection criteria for planning connectivity routes in §16.56.

Section 16.2(a)(31) defines "Transportation management area (TMA)" as an urbanized area with a population over 200,000 as designated by the U.S. Secretary of Transportation. It is a term that distinguishes a type of metropolitan planning organization (MPO) and affects both the MPO's authority to select projects in the programming process and its allocation of funding.

Section 16.2(a)(32) defines "Transportation project" as the planning, engineering, right-of-way acquisition, expansion, improvement, addition, or contract maintenance, other than the routine or contracted routine maintenance of a bridge, highway, toll road or toll road system, railroad, enhancement of a roadway that increases the safety of the traveling public, air quality improvement initiative, or transportation enhancement activity under 23 U.S.C. §101. The term is used to distinguish projects that are not related to aviation, public transportation, or the state's waterways and coastal waters.

Section 16.2(b), Acronyms, is a new provision that identifies 18 terms that are frequently used in the chapter and provides the common abbreviation for each term. For those terms that are not included in the definitions of §16.2(a), each term and abbreviation also contains a reference to the section in the chapter in which the term is primarily described. Examples of the acronyms include "(3) FHWA--Federal Highway Administration," "(6) MTP--Metropolitan Transportation Plan, as described in §16.53 of this chapter (relating to Metropolitan Transportation Plan)," "(8) RTIP--Rural Transportation Improvement Program," and "(11) STIP--Statewide Transportation Improvement Program, as described in §16.103 of this chapter (relating to Statewide Transportation Improvement Program)."

Section 16.3(a), Applicability, provides that the provisions of the chapter apply to the department, all metropolitan planning organizations, rural planning organizations, and appropriate federally funded public transportation operators. This section incorporates the existing provisions of §15.1(b) with only minor non-substantive changes.

Section 16.3(b), Relationship to federal law and regulations, provides that the chapter incorporates by reference federal transportation planning laws and regulations, and that to the extent of any conflict between provisions of the chapter and federal law, the federal law controls. This section incorporates the existing federal law references of §15.1(c) and adds the conflict language to clarify the legal concept that federal law has supremacy over state law.

Section 16.4, Introduction, is a new section that summarizes the planning and programming process, identifies its component parts, and describes the relationship among the department and both metropolitan and rural planning organizations. These entities cooperate in the development of separate but interrelated long-range planning documents that identify projects, strategies, and transportation needs and also in the development of both mid-range and short-range programming documents that contain a listing of prioritized projects for implementation. The provisions in this section are not binding, but are for illustrative purposes only. The purpose is to assist readers with an understanding of the primary planning and programming documents and how they are involved in the overall process.

Section 16.4(c) provides a general description of long-range planning documents that include the 24-year statewide long-range transportation plan developed by the department and the 20-year metropolitan transportation plan developed by each metropolitan planning organization.

Section 16.4(d) provides a general description of the ten-year unified transportation program developed by the department that includes all of the projects, or phases of projects, within the state that the department anticipates can be implemented with funding that is reasonably anticipated to be available at the designated time.

Section 16.4(e) provides a general description of short-range programming documents that include the four-year transportation improvement program developed by metropolitan planning organizations for projects proposed for the metropolitan area, the four-year rural transportation improvement program developed by the department in cooperation with rural planning organizations for projects proposed for all areas of the state outside of metropolitan planning areas, and the four-year statewide transportation improvement program developed by the department for all areas of the state and containing a compilation of the projects identified in the above transportation improvement programs and rural transportation improvement programs. All of the short-range programs must contain estimates of available state, federal, and local funding and the estimated project expenditures.

Section 16.4(f) contains a representational graphic flow chart of planning and programming stages.

Subchapter B, Transportation Planning, incorporates the existing provisions of §15.3, Organization, Structure, and Responsibilities of Metropolitan Planning Organizations (now §16.51); §15.4, Unified Planning Work Program (UPWP) (now §16.52); and §15.6, Metropolitan Transportation Plan (now §16.53). The subchapter adds new sections that establish the structure and requirements of a Statewide Long-Range Transportation Plan (SLRTP) (§16.54); provide for Long-Range Transportation Planning Recommendations for Non-Metropolitan Areas (§16.55); and establish criteria for the Texas Highway Trunk System (§16.56).

Section 16.51, Responsibilities of Metropolitan Planning Organizations (MPO), reorganizes and incorporates most of existing §15.3 with only minor non-substantive changes. The changes clarify existing provisions and remove unnecessary language.

Existing §15.3(e)(1), relating to the responsibility of MPOs in cooperation with the department and public transportation operators for carrying out the metropolitan transportation planning process in accordance with federal regulations and these rules is moved to §16.51(a), General, and reenacted with only minor non-substantive changes.

Section 16.51(b), Membership of MPOs, is added to describe the federal requirement that each MPO that serves a transportation management area shall consist of local elected officials, officials of public agencies that operate major modes of transportation in the area, and appropriate state transportation officials. The provision is added to provide clarification.

Existing §15.3(c)(4), relating to approval of the boundaries of a designated metropolitan planning area and any revision of those boundaries, is moved to §16.51(c), Approval of boundaries, and reenacted with only minor non-substantive changes.

Existing §15.3(d), relating to the requirement for a written agreement between the MPO, the department, and public transportation operators for carrying out transportation planning and programming, is moved to §16.51(d), Metropolitan planning area agreements, and reenacted with only minor non-substantive changes.

Existing §15.3(e)(4), relating to the requirement that an MPO in nonattainment or maintenance areas shall coordinate the development of the transportation plan with the State Implementation Plan including the development of any transportation control measures, is moved to §16.51(e), Coordination with state implementation plan (SIP) development, and reenacted with only minor non-substantive changes.

Existing §15.3(e)(5), relating to the requirement that if more than one MPO has authority in a metropolitan planning area or in a nonattainment or maintenance area, the MPOs and the governor shall cooperatively establish the boundaries of the metropolitan planning area and the respective jurisdictional responsibilities of each MPO, and that the MPOs shall consult with each other to assure the preparation of integrated plans and transportation improvement programs for the entire metropolitan planning area, is

moved to §16.51(f), Metropolitan planning in areas with multiple MPOs, and reenacted with only minor non-substantive changes.

Portions of existing §15.3 are not reenacted. The Purpose provision in §15.3(a); Designations, redesignations, and membership of MPOs in §15.3(b); Metropolitan planning area boundaries in §15.3(c)(1), (2), (3), and (5); Paragraph (5) of §15.3(d) relating to existing agreements; and Paragraphs (2) and (3) of §15.3(e) relating to approval of the metropolitan transportation plan and the transportation improvement program are all not reenacted because they are merely repetitive of federal regulations or other sections in new Chapter 16.

Section 16.52, Unified Planning Work Program (UPWP), incorporates most of existing §15.4. The changes primarily clarify existing provisions with only minor non-substantive changes and remove unnecessary language. New language provides a limited exception to the prior language in existing §15.4(b)(4) that prohibited all reimbursement of travel costs of elected officials.

Existing §15.4(a), relating to the requirement of an MPO to document planning activities in a unified planning work program to indicate who will perform the work, the schedule for completing it, and all products that will be produced, is moved to §16.52(a), Planning activities, and reenacted with only minor non-substantive changes. Existing §15.4(a)(2), relating to development of a prospectus that establishes a multiyear framework, was not reenacted because the concept is no longer provided for in federal regulations.

Existing §15.4(b), relating to the availability and use of federal transportation planning funds, is moved to §16.52(b), Funding, and reenacted with primarily minor non-substantive changes. Existing §15.4(b)(4) relating to a prohibition against the reimbursement of travel costs for elected officials is changed by adding language to authorize reimbursement for elected officials serving on an MPO policy board if the costs are specifically related to a federal award, necessary and reasonable for the proper and efficient administration of the federal award, approved by the awarding federal agency prior to incurring the costs, and not prohibited under federal lobbying restrictions or state or local laws.

Existing §15.5, Metropolitan Planning Process, is not reenacted. The section generally describes the metropolitan planning process for MPOs including development of a metropolitan transportation plan and transportation improvement program. The Responsibilities provision in §15.5(a); Elements in §15.5(b); Public involvement process in §15.5(c); Simplified procedures allowed in §15.5(d); Technical and other reports in §15.5(e); Major investment studies in §15.5(f); Managing and monitoring systems in §15.5(g); and Certification in §15.5(h) were all not reenacted because they were merely repetitive of federal regulations or other sections in new Chapter 16.

Section 16.53, Metropolitan Transportation Plan (MTP), incorporates most of existing §15.6. The changes clarify existing provisions with primarily minor non-substantive changes and remove unnecessary language. New language is added to §16.53(a) and (e) as described in the following paragraphs.

Existing §15.6(a), relating to the requirement of an MPO to develop a metropolitan transportation plan to address at least a 20-year planning horizon and include both long-range and short-range strategies, is moved to §16.53(a), Requirements, and reenacted with primarily minor non-substantive changes. New language in §16.53(a) provides a requirement that the MTP must be based on the funding assumptions and forecasts set forth in §16.151 and §16.152 relating to long-term planning assumptions and cash flow forecast. This financial requirement is also applicable to an MPO's transportation improvement program, the department's statewide transportation improvement program, and the department's unified transportation program. By using common assumptions and forecasts, all entities involved in the planning and programming process will develop documents that are more uniform, consistent, and realistic.

Existing §15.6(b), relating to the development of the MTP in accordance with federal regulations, is moved to §16.53(b), Development, and reenacted with only minor non-substantive changes.

Existing §15.6(c), relating to the approval of the MTP by the applicable MPO and requirements for public involvement in accordance with federal regulations, is moved to §16.53(c), Approval, and reenacted with only minor non-substantive changes.

Existing §15.6(d), relating to submission to the state of copies of any new or revised MTPs for information purposes, is moved to §16.53(d), Submission of new and revised plans, and reenacted with primarily minor non-substantive changes. New language in §16.53(d) requires copies to also be provided to the Federal Highway Administration, Federal Transit Administration, and other applicable federal agencies. This provision clarifies that the federal agencies need to receive copies even though there is no requirement that they approve the MTP.

Section 16.53(e), MTP public participation, is added. It requires the MPO to develop a public participation process covering the development of an MTP in accordance with federal regulations. This provision is similar to that required for the MPO's transportation improvement program in §16.101(m) and makes the two sections consistent.

Section 16.54, Statewide Long-Range Transportation Plan (SLRTP), is a new section that implements the requirements in Title 23 U.S.C. §135, as implemented by 23 C.F.R. Part 450 and Transportation Code, Chapter 201, Subchapter H, for the state to develop a statewide long-range transportation plan that provides for the development and implementation of a transportation system and contains all modes of transportation.

Section 16.54(a), General, requires the department to develop a statewide long-range transportation plan covering a period of not less than 24 years that contains all modes of transportation including: 1) the systems and facilities for highways, turnpikes, aviation, public transportation, railroads, waterways, pedestrian walkways, and bicycle transportation facilities; and 2) the transportation users of each type of facility.

Section 16.54(b), Requirements, provides that the plan must: contain specific, long-term transportation goals for the state; contain specific, measurable targets for each transportation goal; consider the projects and strategies adopted by each MPO and RPO in the organization's long-range plans; identify priority corridors, projects, or areas of the state that are of particular concern to the department in meeting its goals; and contain a participation plan for obtaining input on the goals, measurable targets, projects, and priorities from other state agencies, political subdivisions, MPOs, RPOs, local transportation entities, other officials who have local responsibility for the various modes of transportation, and the general public.

Section 16.54(c), Financial considerations, requires that the plan include: 1) a component that is financially constrained and identifies proposed projects and strategies; and 2) a component that

is not financially constrained and identifies corridors, projects, strategies, and other transportation needs in various areas of the state.

Section 16.54(d), Updates, requires the department to update the plan every four years or more frequently as necessary.

Section 16.54(e), Public involvement during development of the SLRTP, requires the department to provide adequate opportunity for public involvement during the development process by publishing appropriate notice and holding at least one public meeting in each region of the state during which the department will report its progress on the plan and provide a free exchange of ideas, views, and concerns relating to the planning issues.

Section 16.54(f), Public involvement prior to final adoption, requires the department to provide at least one statewide hearing prior to final adoption of the SLRTP or any update of the SLRTP by the commission. The department will publish a notice of a hearing in the *Texas Register* a minimum of 15 days prior to the hearing date; accept written public comments for a period of at least 30 days after the date the notice appears in the *Texas Register;* and make copies of the SLRTP available for review at each of the district offices, at the department's Transportation Planning and Programming Division in Austin, and on the department website.

Section 16.54(g), Publication, requires the department to publish the adopted SLRTP on the department's website and make it available for review at each of the district offices, and at the department's Transportation Planning and Programming Division in Austin.

Section 16.55, Long-Range Transportation Planning Recommendations for Non-Metropolitan Areas, is a new section that authorizes a rural planning organization (RPO) to make recommendations to the department concerning transportation projects, systems, or programs that impact the area within the boundaries of the RPO over the 24-year statewide long-range transportation plan horizon. For an area that is outside of the boundaries of both an MPO and an RPO, those long-range planning recommendations will be made by the district engineer of the district in which the area is located. The recommendations shall include: 1) a prioritized list of mobility projects, rehabilitation projects, and safety projects; and 2) for each listed project, an estimate of project costs as approved by the applicable district. Although the significance and number of RPOs is growing around the state and the department currently allows an RPO to informally participate in the statewide long-range planning process, there is no existing state law or rule that formally recognizes that participation.

Section 16.56, Texas Highway Trunk System, incorporates and reenacts existing §15.42 relating to the criteria used by the commission for choosing routes to be included in and developed as a part of the rural network of four-lane or better divided highways known as the Texas Highway Trunk System that serve as a principal connector of all Texas cities with over 20,000 population as well as major ports and points of entry. Examples of the eleven criteria include: maximizing the use of existing four-lane divided roadways; minimizing circuitous or indirect routing; connecting with principal roadways from adjacent states; serving significant military or other national security installations; closing gaps in the existing state highway system; and providing system connectivity.

Subchapter C, Transportation Programs, incorporates the existing provisions of §15.7, Transportation Improvement Program (TIP) (now §16.101); and §15.8, Statewide Transportation Improvement Program (STIP) (now §16.103). It adds new sections that establish the structure and requirements of a Rural Transportation Improvement Program (RTIP) (§16.102); provide for Ten-Year Transportation Programming Recommendations for Non-Metropolitan Areas (§16.104); and establish the structure and requirements of a Unified Transportation Program (UTP) (§16.105).

Section 16.101, Transportation Improvement Program (TIP), reorganizes and incorporates most of existing §15.7. The changes clarify existing provisions with primarily minor non-substantive changes and remove unnecessary language. New language is added to §16.101(a), (g), and (k). Those portions of §15.7 that specifically relate to rural areas are removed and reenacted as a new section dedicated to rural transportation improvement programs in §16.102.

Existing §15.7(a), relating to the requirement of an MPO to develop a transportation improvement program for the metropolitan planning area containing a list of projects that have been approved for development in the near term, is moved to §16.101(a), Requirements, and reenacted with primarily minor non-substantive changes. New language in §16.101(a) provides a requirement that the list of projects must be prioritized by the category of funding described in §16.153 and by project within each funding category. This prioritization requirement relates to a need for both the department and MPO to identify the projects appropriate for selection in the unified transportation program and those that might be advanced or delayed in the event of a significant change in funding as provided in §16.160. New language in §16.101(a) also prescribes that an approved TIP is then included in the statewide transportation program, which contains a listing of projects for all areas of the state that are likely to be implemented in that identified four-year period. This provision is added for informational purposes to illustrate how the various programs are interrelated. The last three sentences of existing §15.7(a) relating to a general description of the process for developing a TIP were removed and not reenacted because they were merely repetitive of other provisions in §16.101 and elsewhere in new Chapter 16.

Existing §15.7(b)(1), relating to the MPO's obligation to cooperatively develop a TIP and financial plan with the department and public transportation operators, and to update the TIP at least every two years, is moved to §16.101(b), Development of transportation improvement program (TIP), and reenacted with only minor non-substantive changes.

Existing §15.7(b)(2), relating to the department's obligation to develop a TIP for all areas of the state outside of metropolitan areas, is moved to §16.102(a) concerning development of the Rural Transportation Improvement Program (RTIP), and reenacted with only minor non-substantive changes.

Existing §15.7(c), relating to the authorized grouping by function, geographic area, or work type of projects that are not considered by the department and the MPO to be of appropriate scale for individual identification in a given program year, is moved to §16.101(c), Grouping of projects, and reenacted with only minor non-substantive changes.

Existing §15.7(d), relating to the type of projects that may be excluded from the TIP by agreement between the department and the MPO, including certain safety projects, planning and research activities and certain projects for resurfacing, restoration,

rehabilitation, reconstruction, or highway safety improvement, is moved to §16.101(d), Projects excluded, and reenacted.

Existing §15.7(e), relating to requirements that: 1) a project must be consistent with the metropolitan transportation plan; 2) a project must be consistent with the statewide long-range transportation plan; 3) a project must conform to the Clean Air Act and the state implementation plan in nonattainment and maintenance areas; and 4) the MPO in each urbanized nonattainment and maintenance area will be responsible for preparation of the conformity determination requirements of the Clean Air Act and the Environmental Protection Agency conformity regulations, and the department will be responsible for preparation of the same conformity determination requirements in nonattainment and maintenance areas outside of metropolitan planning areas, is moved to §16.101(e), Consistency and conformity, and reenacted with only minor non-substantive changes.

Existing §15.7(f), relating to development of a uniform TIP format to produce a uniform statewide transportation improvement program, is moved to §16.101(f), Format, and reenacted with only minor non-substantive changes.

Existing §15.7(g), relating to the development, by an MPO in cooperation with the department and public transportation operators, of a financial plan that demonstrates consistency with funding reasonably expected to be available during the relevant period, is moved to §16.101(g), Financial plan, and reenacted with primarily minor non-substantive changes. New language in §16.101(g) is added to emphasize the federal requirement that in nonattainment areas, the financial plan must demonstrate that funding is available or committed for the first two years of the TIP.

Existing §15.7(h), relating to the requirement that the TIP be approved by both the MPO and the state and that the state will approve the TIP if it finds that the TIP has met all federal requirements and the requirements of these rules, is moved to §16.101(h), Transportation improvement program (TIP) approval, and reenacted with primarily minor non-substantive changes. The listing in existing §15.7(h) of six specific criteria to be met in developing the TIP has been replaced with new language added to §16.101(h) that requires compliance with the project selection criteria listed in §16.105(d) for the unified transportation program. The project selection criteria listed in §16.105(d) are substantially the same as the existing six criteria and the change is intended to provide for a consistent uniform approach to the selection of projects for all areas of the state.

Existing §15.7(i), relating to the requirement that an MPO, as a management tool for monitoring progress in implementation of the metropolitan transportation plan, identify the criteria and process for prioritizing implementation of transportation plan elements for inclusion in the TIP and any changes in priorities from previous TIPs, is moved to §16.101(i), Management, and reenacted with only minor non-substantive changes.

Existing §15.7(j), relating to the requirement that the frequency and cycle for updating the TIP must be compatible with the statewide transportation improvement program development process, is moved to §16.101(j), Updating, and reenacted with only minor non-substantive changes.

Existing §15.7(k), relating to requirements for amending the TIP, is moved to §16.101(k), Modification, and reenacted with primarily minor non-substantive changes.

Under §16.101(k)(1), amendments to the TIP must be consistent with the procedures established in §16.101 for development and approval of the TIP and with stipulations that list when an amendment is required in attainment areas, when an amendment is required in nonattainment areas, and when an amendment is not required. New language in §16.101(k)(1)(A)(iv) and (B)(iv) adds "fourth year" in order to comply with federal regulations. New language in §16.101(k)(1)(A)(v) and (B)(vi) adds the phrase "or funding availability" in order to comply with federal regulations. New language in §16.101(k)(1)(B)(ii) adds the phrase "design concept" in order to comply with federal regulations. New language in §16.101(k)(1)(C)(ii) adds the clarification that an amendment is not required if the change is not greater than 50 percent of the approved cost estimate and the revised cost estimate is less than $1,500,000, and the change in the cost estimate is not caused by a change in the project work scope or limits. This language is added to comply with federal regulations.

Under §16.101(k)(2), in nonattainment and maintenance areas for transportation related pollutants, a conformity determination must be made on any new or amended TIPs (unless the amendment consists entirely of projects exempt under §16.101(c)) in accordance with Clean Air Act requirements and the Environmental Protection Agency conformity regulations.

Existing §15.7(l)(1), relating to inclusion of the approved TIP without modification in the statewide transportation improvement program, except that in nonattainment and maintenance areas the Federal Highway Administration and the Federal Transit Administration must make a conformity determination before inclusion, is moved to §16.101(l), Transportation improvement program (TIP) relationship to statewide transportation improvement program (STIP), and reenacted with only minor non-substantive changes.

Existing §15.7(l)(2), relating to inclusion of the approved rural TIP in the statewide transportation improvement program, except in nonattainment and maintenance areas outside metropolitan planning areas where federal determinations of conformity must be made before inclusion, is moved to §16.102 Rural Transportation Improvement Program (RTIP), subsection (h), Relationship to statewide transportation improvement program (STIP), and reenacted with only minor non-substantive changes.

Existing §15.7(m)(1), relating to the public participation process covering the development and amendment of a TIP in accordance with federal regulations, is moved to §16.101(m), TIP public participation, and reenacted with only minor non-substantive changes.

Existing §15.7(m)(2), relating to the public participation process covering the development and revisions of a rural TIP, including requirements for publication in a newspaper with general circulation in each county within the district of a notice of the rural TIP, a public hearing, and a ten-day comment period, is moved to §16.102 Rural Transportation Improvement Program (RTIP), subsection (i), Rural public involvement process, and reenacted with only minor non-substantive changes.

Existing §15.7(n), relating to project selection procedures from an approved TIP that vary depending on whether a project selected for implementation is located in a transportation management area and what type of federal funding is involved, is moved to §16.101(n), Project selection procedures, and reenacted with only minor non-substantive changes.

Under §16.101(n)(1), the first year of both the TIP and the statewide transportation improvement program (STIP) constitute an agreed to list of projects, although project selection may be revised if the apportioned funds are significantly more or less than the authorized funds. Only projects included in the federally approved STIP will be eligible for federal funding.

Under §16.101(n)(2), in an area not designated as a transportation management area, the commission or the affected public transportation operator, in cooperation with the MPO, will select projects to be implemented using federal funds from the approved TIP, other than federal lands highways program projects.

Under §16.101(n)(3), in an area designated as a transportation management area, an MPO, in consultation with the department and public transportation operator, shall select funded projects from the approved TIP and in accordance with the TIP priorities, except projects on the National Highway System and projects funded under the bridge, interstate maintenance, safety, and federal lands highways programs. The commission, in cooperation with the MPO, will select projects on the National Highway System and projects funded under the bridge, interstate maintenance, and safety programs.

Section 16.102, Rural Transportation Improvement Program (RTIP), is a new section that incorporates and reenacts those portions of existing §15.7 that specifically relate to rural areas. The provisions are reorganized into a structure similar to §16.101 relating to development of a transportation improvement program (TIP) in metropolitan planning areas.

Section 16.102(a), Development, requires the department to develop a transportation improvement program for all areas of the state outside of metropolitan planning areas that contain a prioritized list of projects that have been approved for development in the near term. Subsection (a) is a reenactment of existing §15.7(b)(2) with primarily minor non-substantive changes. New language in §16.102(a) provides that the RTIP will be developed in cooperation with rural planning organizations (RPO) and projects will be selected in accordance with federal regulations and the requirements of the subchapter. This addition is a continuation of the formal recognition of RPOs in the planning and programming process.

Section 16.102(b), Grouping of projects, authorizes the grouping by function, geographic area, or work type of projects that are not considered by the department to be of appropriate scale for individual identification in a given program year. This is similar to the requirement for a TIP in metropolitan planning areas under §16.101(c).

Section 16.102(c), Approval, provides that the commission, or the executive director, if delegated by the commission, will approve an RTIP if it meets all federal requirements and the requirements of the subchapter.

Section 16.102(d), Updating, provides that the frequency and cycle for updating an RTIP must be compatible with the statewide transportation improvement program. This is similar to the requirement for a TIP in metropolitan planning areas under §16.101(j).

Section 16.102(e), Modification, provides that the RTIP may be amended consistent with the requirements established in §16.101(k).

Section 16.102(f) Relationship to the statewide long-range transportation plan (SLRTP), requires that a project in the RTIP must be consistent with the statewide long-range transportation plan. This is similar to the requirement for a TIP in metropolitan planning areas under §16.101(e).

Section 16.102(g), Relationship to the Clean Air Act (CAA) and State Implementation Plan (SIP), requires that in nonattainment and maintenance areas, a project selected for the RTIP must conform to the CAA and SIP. This is similar to the requirement for a TIP in metropolitan planning areas under §16.101(e).

Section 16.102(h), Relationship to statewide transportation improvement program (STIP), provides that after approval, RTIPs will be included in the STIP, except that a federal determination of conformity must be made for nonattainment and maintenance areas that are outside of metropolitan areas before projects in that area may be included in the STIP. This is similar to the requirement for a TIP in metropolitan planning areas under §16.101(l).

Section 16.102(i), Rural public involvement process, requires the department to develop and implement a public participation process covering the development and revisions of an RTIP, including requirements for publication in a newspaper with general circulation in each county within the district, of a notice of the RTIP, a public hearing, and a ten-day comment period.

Section 16.102(j), Project selection, requires the department to develop and annually reevaluate project selection procedures for state projects that lie outside of metropolitan planning areas in accordance with §16.103(g) relating to the statewide transportation improvement program (STIP).

Section 16.103, Statewide Transportation Improvement Program (STIP), incorporates most of existing §15.8. The changes clarify existing provisions with primarily minor non-substantive changes and remove unnecessary language. New language is added to §16.103(c) - (f).

Existing §15.8(a), relating to the requirement of the state to carry out a continuing, comprehensive, and intermodal statewide transportation planning process, is moved to §16.103(a), Purpose, and reenacted with only minor non-substantive changes.

Existing §15.8(b), relating to the requirement that the department, in cooperation with metropolitan planning organizations (MPO) designated for metropolitan areas and rural planning organizations (RPO) designated for areas that are not within the boundaries of an MPO, will develop a STIP covering a period of four years for all areas of the state in accordance with federal requirements, is moved to §16.103(b), Statewide transportation improvement program (STIP) development, and reenacted with primarily minor non-substantive changes. New language in §16.103(b) adds RPOs as entities that may formally participate in the STIP process. New language in the form of subparagraph (E) is added to §16.103(b)(1) to authorize exclusion of projects from the STIP by agreement of the department and MPO in accordance with requirements of §16.101(d) relating to the TIP. This addition is necessary to make §16.103(b) consistent with §16.101(d).

Existing §15.8(c), relating to the requirement that the STIP reflect the priorities for programming and expenditure of funds and will: 1) include a financial plan, 2) be consistent with funding reasonably expected to be available during the relevant period, and 3) be financially constrained by year, is moved to §16.103(c), Statewide transportation improvement program (STIP) financial plan, and reenacted with primarily minor non-substantive changes. New language in §16.103(c)(2) adds the clarification that the funding reasonably expected to be available during the relevant period is to be determined by the

unified transportation program in new §16.105. This addition reinforces the concept that funding expectations at all levels of the planning and programming process should be the same to provide a uniform, consistent, and interrelated process.

Existing §15.8(d), relating to the public involvement process for development of the STIP is completely rewritten and moved to §16.103(d), Statewide transportation improvement program (STIP) public involvement process. Existing language only requires one statewide public hearing prior to final adoption of the STIP. To provide for public involvement during the development process, new language in §16.103(d)(1) adds a requirement of at least one publicized public meeting in each region of the state to allow for the free exchange of ideas, views, and concerns relating to proposed projects and priorities. The existing requirement for a statewide public hearing is retained but is expanded to provide for 15 days notice and a total of 30 days after the publication of the notice for the public to provide written comments. The same public involvement process is applied to STIP amendments in §16.103(d)(2).

Existing §15.8(e), relating to the requirement that the STIP be approved by the state and that the state will approve the STIP if it finds that the STIP has met all the requirements of these rules, is moved to §16.103(e), Statewide transportation improvement program (STIP) approval, and reenacted with primarily minor non-substantive changes. The listing in existing §15.8(e) of six specific criteria to be met in developing the STIP has been replaced with new language added to §16.103(e) that requires compliance with the project selection criteria listed in §16.105(d) for the unified transportation program. The project selection criteria listed in §16.105(d) are substantially the same as the existing six criteria and the change is intended to provide for a consistent uniform approach to the selection of projects for all areas of the state.

Existing §15.8(f), relating to the STIP quarterly revision cycle and requirements for exceptions to the quarterly revision schedule, including availability of additional funding and a revision that involves a project which is expected to have a significant effect on capacity, connectivity, or public safety and security, is moved to §16.103(f), Statewide transportation improvement program (STIP) revisions, and reenacted with primarily minor non-substantive changes. New language in §16.103(f)(2) adds the clarification that the request must be in writing and include reasons justifying the need for the exception.

Existing §15.8(g), relating to project selection from an approved STIP is moved to §16.103(g), Project selection procedures, and reenacted with only minor non-substantive changes.

Section 16.104, Ten-Year Transportation Programming Recommendations for Non-Metropolitan Areas, is a new section that authorizes a rural planning organization (RPO) to make recommendations to the department concerning the prioritization of projects and programs in the department's unified transportation program to be developed within the boundaries of the RPO. For an area that is outside of the boundaries of both an MPO and an RPO, the programming recommendations will be made by the district engineer of the district in which the area is located. The recommendations must include a prioritized list of projects with input from officials of affected municipalities, counties, and local transportation entities. The addition of RPOs in the programming process is a continuation of the attempt to formalize RPO participation.

Section 16.105, Unified Transportation Program (UTP), is a new section that formalizes the department's ten-year financially constrained program. The UTP includes all of the projects, or phases of projects, covered in the four-year statewide transportation improvement program (STIP) plus those projects, or phases of projects, within the state that the department anticipates can proceed to letting within the next six years. A project's inclusion in the UTP also represents a commitment to its continued development. Although there is no state or federal law that requires development of the UTP, the department has long recognized its usefulness in providing an intermediate timeframe in the statewide project development process that links the short-range four-year programs to the statewide long-range transportation plan. Inclusion of the UTP in these rules contributes to the department's effort to create a formalized comprehensive transportation planning and programming process.

Section 16.105(a), General, requires the department, in cooperation with metropolitan planning organizations (MPO), rural planning organizations (RPO), and public transportation operators to develop a UTP that covers a period of ten years to guide the development and authorize construction of highway and rail transportation projects and projects involving aviation, public transportation, and the state's waterways. It is intended that the UTP consolidate in one document the anticipated project development for all modes of transportation during the next ten years.

Section 16.105(b), Requirements, provides that the UTP will: 1) be financially constrained and estimate funding levels and the allocation of funds to each district and MPO in accordance with Subchapter D of 43 TAC Chapter 16; 2) list all projects and programs that the department intends to develop during the ten-year program period after consideration of the statewide long-range transportation plan, metropolitan transportation plans (MTP), TIPs, STIP, the MPOs annual reevaluations of the MTPs and TIPs, and recommendations of RPOs; and 3) be organized by funding category, district, mode of transportation, and year a project is scheduled for development. It is intended that the department consider the plans and programs of all MPOs and RPOs in development of the UTP, and organize the UTP in a manner that ties project selection to funding categories to provide a transparent, well defined, and understandable document.

Section 16.105(c), MPO annual reevaluation of project selection, requires an MPO to annually reevaluate the status of project priorities and selection in its approved MTP and TIP and provide a report of any changes to the department. It is intended that this reevaluation will provide the department with the most current project information and enable the department to develop a more realistic UTP. The annual reevaluation is necessary because the MTP and TIP are not updated annually nor are they necessarily on the same schedule as the UTP.

Section 16.105(d), Project selection, paragraph (1) describes the criteria for project selection in the UTP that the commission will consider including: the potential of the project to increase safety, maintain and preserve the existing transportation system, provide congestion relief, increase the accessibility and mobility of the transportation system, support the economic vitality of the area, and promote efficient system management and operation; and adherence to all accepted department design standards as well as applicable state and federal law. It is intended that these criteria will be applicable to the selection processes used by MPOs and RPOs to provide for a consistent uniform approach to the selection of projects for all areas of the state (the criteria

are incorporated into the transportation improvement program requirements under §16.101(h)) and the state transportation improvement program requirements under §16.103(e)).

Section 16.105(d), Project selection, paragraph (2) provides that the commission will determine and approve the final selection of projects and programs to be included in the UTP except for the selection of federally funded projects by an MPO serving in an area designated as a transportation management area as provided for in §16.101(n). This provision is in accordance with federal requirements. Selection of federally funded projects by an MPO serving in an area designated as a transportation management area is subject to satisfaction of the project selection criteria in §16.105(d)(1), compliance with federal law, and the district's and MPO's allocation of funds for the applicable years. These requirements are intended to provide for a consistent, uniform, and realistic approach to the selection of projects for all areas of the state.

Section 16.105(e), Approval of unified transportation program (UTP), provides that the commission will adopt the UTP not later than March 31 of each even-numbered year. It may be updated more frequently if necessary. The commission will hold a hearing prior to final adoption of the UTP and any updates and approval of any adjustments to the program resulting from changes to the allocation of funds under §16.160 relating to Funding Allocation Adjustments.

Section 16.105(f), Program revisions, provides that a project may be added to the UTP, or a project within the UTP may be moved forward or delayed if the status of a listed project or projects change, and if the moved or added project can be developed and constructed within the district's or MPO's allocated funds for the applicable year. The department, an MPO, RPO, or public transportation operator may request a revision and if requested, the department will, in coordination with the other affected parties, determine if the revision is appropriate. This subsection provides the flexibility necessary to revise the UTP for individual projects based on unexpected events without going through the more formal update or adjustment procedures.

Section 16.105(g), Public involvement during development of the unified transportation program, requires the department to provide adequate opportunity for public involvement in development of the UTP. The department will divide the state into regions and hold at least one publicized public meeting in each region to allow for the free exchange of ideas, views, and concerns relating to project selection, funding categories, level of funding in each category, each region's allocation of funds for each year of the program, and the relative importance of the various selection criteria.

Section 16.105(h), Public involvement prior to final adoption, requires the department, prior to adoption of the UTP and approval of any updates, to hold at least one statewide public hearing on its project selection process including the UTP's funding categories, level of funding in each category, each region's allocation of funds for each year of the program, and the relative importance of the various selection criteria. The department will provide a minimum of 15 days prior notice of the hearing and a total of 30 days after the date of the notice for the public to provide written comments.

Section 16.105(i), Publication, requires the department to publish the approved UTP, updates, and adjustments on the department's website. The documents will also be available for review at each of the district offices and at the department's Finance Division offices in Austin.

Subchapter D, Transportation Funding, contains all new provisions. It requires the department to develop mutually acceptable assumptions for the purposes of long-range federal and state funding forecasts in §16.151, Long-Term Planning Assumptions; requires the department to issue annual cash flow forecasts that are based on the above funding assumptions in §16.152, Cash Flow Forecast; establishes program funding categories for both highway related projects and other modes of transportation in §16.153, Funding Categories; establishes formulas for the allocation of funds for certain of the program funding categories in §16.154, Transportation Allocation Funding Formulas; exempts revenue to which Transportation Code, Chapter 228 applies from allocation by formula in §16.155, Surplus Revenue and Contract Payments Not Allocated by Formula; places limits on the commission's ability to allocate funds based on a region's participation in toll projects in §16.156, Limitation on Allocation of Funds; identifies the authorized uses of funds allocated to a district or metropolitan planning organization (MPO) in §16.157, Use of Allocated Funds; imposes an encumbrance on funds allocated to a district or MPO based on the district engineer's estimate of project costs in §16.158, Encumbrance of Allocated Funds; establishes a procedure for the voluntary transfer of allocated funds from one MPO to another in §16.159, Voluntary Transfer of Allocated Funds; and establishes a procedure for adjusting the allocation of funds in the event of significant changes in the department's funding in §16.160, Funding Allocation Adjustments. Issues of funding are critical to the development of realistic financially constrained planning and programming documents by MPOs and the department. It is also critical that requirements for financial assumptions and forecasts, as well as allocation of funding, be well-defined, predictable, and applicable to all parties and regions throughout the state. The sections in this chapter are based on concepts described in the transportation planning article of House Bill No. 300 from the Regular Session of the Texas Legislature in 2009.

Section 16.151, Long-Term Planning Assumptions, provides for the department to develop mutually acceptable assumptions for the purposes of long-range federal and state funding forecasts and development of the metropolitan transportation plans (MTP) and the statewide long-range transportation plan (SLRTP) in §16.53 and §16.54. The department and each planning organization will use the same basic funding assumptions to provide consistent and realistic plans.

Section 16.151(b), Factors, describes the factors to be included in the assumptions including anticipated levels of available state gas tax revenues, registration fees and other state non-gas tax revenues, and federal transportation funding. It also may include other factors considered appropriate by the commission.

Section 16.151(c), Optional factors, authorizes MPOs to include other optional funding assumptions to be used in development of a separate supplement to the MTP and its portion of the SLRTP. Although all MPOs must use the basic assumptions provided by the department in §16.151(b), individual MPOs may include local funding options and contingent state, federal, and local funding sources in the supplement to address local conditions. The supplement must clearly identify and separate the basic state funding forecasts developed by the department from the individual MPO forecasts and describe the rationale for incorporating each additional funding option and source. The supplement may only contain reasonable funding assumptions and the MPO must co-

operate with the department in development of those additional assumptions.

Section 16.152, Cash Flow Forecast, subsection (a), Forecast, requires the department to issue a cash flow forecast for each source of funding that covers a period of not less than 20 years and based on the funding assumptions developed under §16.151.

Section 16.152(b), Requirements, requires that the forecast identify all sources of funding, including bond proceeds, available for projects involving all modes of transportation and any limitations imposed by state or federal law on the use of the identified source.

The remaining subsections of §16.152 provide that: the first one or two years of the forecast, as appropriate must be based on amounts appropriated by the legislature; the forecast will be updated at least annually; the forecast and updates will be available on the department's website for viewing and the documents will be available for review at each district office and in Austin; and the commission will use the cash flow forecast to estimate funding levels for each year, determine the annual amount of funding in each of the program funding categories described in §16.153, and allocate funding in the districts, MPOs, and other authorized entities in accordance with §16.154. The cash flow forecast is critical to developing realistic and predictable planning and programming documents.

Section 16.153, Funding Categories, formalizes 12 funding categories for highway related projects and 4 funding categories for projects involving other modes of transportation, into which funds are allocated under the ten-year unified transportation program (UTP) under §16.105. Although there is no state or federal law that requires development of specific funding categories, the department has long recognized the usefulness of funding categories in providing a framework for the allocation of funds. Inclusion of funding categories in these rules contributes to the department's effort to create a formalized structure for its programming of projects that is transparent, well-defined, understandable, and predictable.

Section 16.153(a), Highway program funding categories, describes the 12 program funding categories for highway related projects: Category 1 Preventive Maintenance and Rehabilitation, that includes minor roadway modifications on the existing state highway system to improve operations and safety, and the installation and maintenance of pavement, bridges, and traffic devices; Category 2 Metropolitan and Urban Corridor Projects, that include mobility and added capacity projects along a corridor that improve transportation facilities in metropolitan and urbanized areas; Category 3 Non-Traditionally Funded Transportation Projects, that include projects that qualify for funding from sources not traditionally part of the state highway fund such as state bond financing, pass-through toll financing, unique federal funding, and local participation funding; Category 4 Statewide Connectivity Corridor Projects, that include mobility and added capacity projects on major state highway system corridors providing statewide connectivity between urban areas and corridors; Category 5 Congestion Mitigation and Air Quality Improvement, that includes projects to address attainment of a national ambient air quality standard in the nonattainment areas of the state; Category 6 Structures Replacement and Rehabilitation, that includes replacement and rehabilitation of deficient existing bridges, construction of grade separations at highway-railroad crossings, and rehabilitation of deficient railroad underpasses; Category 7 Metropolitan Mobility and Rehabilitation (TMA), that includes transportation needs within the boundaries of designated metropolitan planning areas of MPOs located in a transportation management area; Category 8 Safety, that includes safety related projects both on and off the state highway system; Category 9 Transportation Enhancement, that includes categories outlined in federal law and building new safety rest areas; Category 10 Supplemental Transportation Projects, that include projects that do not qualify for funding in other categories, such as landscape, erosion control and environmental mitigation, and replacement of railroad crossing surfaces; Category 11 District Discretionary, that includes projects eligible for federal or state funding selected at the district engineer's discretion; and Category 12 Strategic Priority, that includes projects with specific importance to the state including those that generally promote economic opportunity, increase efficiency on military deployment routes, maintain the ability to respond to emergencies, and provide pass-through toll financing for local communities. These categories are similar to the funding categories currently being used in the department's UTP. The major changes are a combination of both metropolitan and urban corridor projects (previously Categories 2 and 3) into one Category 2, and the addition of non-traditionally funded transportation projects into Category 3.

Section 16.153(b), Program funding categories for other modes of transportation and transportation infrastructure, describes the four program funding categories for modes of transportation other than highway related projects: Aviation Capital Improvement Program, that includes projects for general aviation airport development based on anticipated federal funding for specific programs; Public Transportation, that includes multimodal related projects based on the anticipated federal funding levels for public transportation including types of bus service and special transit service; Rail, that includes both freight and passenger rail related projects; and State waterways and coastal waters, that includes the widening, deepening, and expansion of the main channel of the Gulf Intracoastal Waterway and other maritime related projects.

Section 16.153(c), Determination of funding allocations, provides that the commission will determine the amount of funds to be allocated to each program funding category, subject to the mandates of state and federal law.

Section 16.154, Transportation Allocation Funding Formulas, describes specific formulas for the commission's allocation of funds from seven of the program funding categories to the districts and MPOs. Allocation of funds from the remaining funding categories is dictated either by specific federal and state law, or is at the discretion of the commission. The intent is to increase predictability and transparency by formalizing the allocation process.

Section 16.154(a), Formula allocations, describes the specific formulas for the commission's allocation of funds from seven of the program funding categories: Category 1 Preventive Maintenance and Rehabilitation, to all districts; Category 2 Metropolitan and Urban Corridor Projects, to both MPOs operating in transportation management areas (87% of Category 2 funding) and MPOs operating in areas that are not transportation management areas (13% of Category 2 funding); Category 4 Statewide Connectivity Corridor Projects, to districts; Category 5 Congestion Mitigation and Air Quality Improvement, to districts and MPOs; Category 7 Metropolitan Mobility and Rehabilitation (TMA), to MPOs that are in transportation management areas; Category 9 Transportation Enhancement, (one-half of the funds

in Category 9) to MPOs that are in transportation management areas; and Category 11 District Discretionary, to all districts.

Section 16.154(b), Pace factor calculation, describes the calculation and effect of the term "Pace factor" as it is used in the formulas for Category 1.

Section 16.154(c), Non-formula allocations, authorizes the commission, subject to the mandates of state and federal law, to determine the amount of funding to be allocated to a district, MPO, political subdivision or other eligible entity from the remaining ten program funding categories: Category 3 Non-Traditionally Funded Transportation Projects; Category 6 Structures Replacement and Rehabilitation; Category 8 Safety; Category 9 Transportation Enhancement (one-half of the funds in this category); Category 10 Supplemental Transportation Projects; Category 12 Strategic Priority; Aviation Capital Improvement Program; Public Transportation; Rail; and State waterways and coastal waters. For most of these categories, the allocations are determined by specific mandates of state and federal law.

Section 16.154(d), Formula revisions, provides that the commission will review and, if determined appropriate, revise the formulas and criteria for allocation of funds at least every four years.

Section 16.155, Surplus Revenue and Contract Payments Not Allocated by Formula, clarifies that toll revenue governed by Transportation Code, Chapter 228 must be allocated in accordance with that chapter and is not considered revenue to be allocated under §16.154.

Section 16.156, Limitation on Allocation of Funds, prohibits the commission from imposing a requirement that a toll project be included in a region's transportation plan or program as a condition for the allocation of funds to the region. Subsection (b) also prohibits the department and commission from revising a formula in the UTP in a manner that results in a decrease of an allocation to a district or MPO because of the failure of a region to include toll projects in the region's plan, participation by a political subdivision in the funding of a project, or payments, project savings, and other revenue received by the commission or the department under a comprehensive development agreement and used for a project in the region.

Section 16.156(b)(2) further prohibits the department and commission from taking any other action that would reduce funding allocated to a district or MPO without the prior consent of the MPO because of the failure of a region to include toll projects in the region's plan, receipt by a region of payments, project savings, and other revenue received by the commission of the department under a comprehensive development agreement, or the need of another district or MPO for increased funding to complete a pending project.

Section 16.157, Use of Allocated Funds, authorizes a district or MPO to use funds allocated to it under §16.154 to pay project costs, provide toll equity, or make payments under a pass-through toll agreement, or fund operation costs of an MPO in accordance with §16.52 relating to the unified planning work program. This section clarifies the uses to which project funding under the UTP can be applied and promotes accountability.

Section 16.158, Encumbrance of Allocated Funds, provides that the allocation of funds to a district or metropolitan planning organization will be encumbered in an amount equal to the estimate of the project cost and periodically adjusted to reflect the bid award, any change orders that modify the bid award, and the total amount paid when the project is completed. This section requires that allocated funds be dedicated to the selected projects and promotes accountability in the budgeting process.

Section 16.159, Voluntary Transfer of Allocated Funds, authorizes an MPO to voluntarily transfer funds allocated to it under §16.154 to another MPO. To effect a transfer, §16.159(b) requires a written agreement executed by the MPOs and approved by the executive director, that includes the amount of funding to be transferred and the applicable program funding category, the total amount of funds to be reimbursed, the applicable program funding category, the reimbursement period, the payment schedule, and a description of the projects to be developed with the transferred funds. Section 16.159(c) requires commission approval of the transfer and sets forth the criteria by which the commission will make its decision. Section 16.159(d) recognizes the obligation of a recipient MPO to reimburse the lending MPO and establishes a priority for that reimbursement with regard to the allocation of future funding in the applicable program funding category. This section recognizes the need and formalizes the process for transfers of funding among MPOs to meet varying financial needs around the state and to prevent the possible loss of federal obligation authority or apportionment in certain fiscal years when selected projects are delayed.

Section 16.160, Funding Allocation Adjustments, provides a formalized process for revising allocations of funds to each program funding category or from the program funding categories to the districts and MPOs, based on significant changes in the department's funding.

Under §16.160(b), Allocation revisions, the commission may revise the allocation of funds if a significant change in funding is identified by the department's chief financial officer in an updated cash flow forecast. The commission may approve 1) a specific percentage increase or decrease in the allocation of funds and, subject to the mandates of state and federal law, apply the percentage change equally to each program funding category; or 2) an increase or decrease in the allocation of funds to one or more program funding categories after considering the total amount of the change, priority of the funding category based on the category's relationship to stated commission goals, mandates of state and federal law, and best interests of the state.

Section 16.160(c), Adjustment of programs, provides that after the commission approves a change in the allocation of funds to a program funding category under §16.160(b), the funds allocated to individual districts and MPOs will be proportionally adjusted and the UTP, STIP, and TIPs will be revised in accordance with the applicable change in funding. Specific projects will be advanced or delayed in the order of the planning organization's and department's listed priorities in the applicable programs.

Section 16.160(d), Preference for allocation of funding increases, provides that if the allocation of funds to a district or MPO is reduced under §16.160(c), any subsequent increase in the allocation of funds to the applicable program funding category will be allocated first to the accounts of the districts and MPOs that were previously reduced. This subsection provides for a mechanism to ensure that there is a fair distribution of future funding.

Section 16.160(e), Public involvement, requires public involvement of at least one statewide public hearing and a 30 day comment period for a proposed change in the allocation of funds to a program funding category, and §16.160(f), Publication, requires publication of documents describing each change in the alloca-

tion of funds on the department's website and at each of the district offices and in Austin.

Subchapter E, Project and Performance Reporting, contains all new provisions. It requires the department to establish an overall project and performance reporting system in §16.201, Project and Performance Reporting System; develop a four-year business work plan for tracking the delivery of each transportation project in the UTP in §16.202, Reporting System for Delivery of Individual Projects; develop a set of performance measures for evaluating the effectiveness of department expenditures on the statewide transportation system in achieving the transportation goals in §16.203, Performance Reporting on the Operation and Condition of the Statewide Transportation System; and develop an account information reporting system for tracking money deposited to the state highway fund in §16.204, Reporting System for Funding and Expenditures. Section 16.205, Department Information Consolidation, authorizes the department to combine reports to the extent practicable to avoid duplication of reporting requirements. A formalized project and performance reporting system is critical to the department's efforts to provide a transparent and understandable planning and programming process. The sections in this subchapter are based on concepts described in the transportation planning article of HB 300 from the Regular Session of the Texas Legislature in 2009.

Section 16.201, Project and Performance Reporting System, describes the overall requirement for the department to establish a project and performance reporting system to be made available on the department's website. Each district is required to enter information about each of its transportation projects into the system.

Section 16.202, Reporting System for Delivery of Individual Projects, requires the department to develop a four-year business work plan for tracking the delivery of transportation projects that are being developed or under construction and identified in the UTP. For each project, the work plan must contain an identification of each phase of project development, the estimated cost of each phase of project development, a project schedule with timelines, a summary of progress that identifies whether the project is being completed on-time and on-budget, and a list of department employees responsible for the project. The department will use the work plan to prepare its budget, monitor the performance of the district, and evaluate the performance of district employees. Information contained in the work plan will be updated at least monthly.

Under §16.202(b), the department must conduct an annual review of project benchmarks and timelines and create an annual report on its level of achievement statewide and by district. Section 16.202(c) requires the department to make copies of the annual reports available to each member of the legislature and §16.202(d) requires the department to provide copies to the lieutenant governor, the speaker of the house of representatives, and the chair of the standing committee of each house of the legislature with primary jurisdiction over transportation issues.

Section 16.203, Performance Reporting on the Operation and Condition of the Statewide Transportation System, requires the department to develop a set of performance measures for evaluating the effectiveness of its expenditures on the statewide transportation system in achieving the transportation goals identified by the statewide long-range transportation plan.

Section 16.203(b), Performance measures, describes ten performance measures that are required. Examples include the percentage of transportation construction projects for which construction is completed on-time and on-budget; peak hour travel congestion in the eight largest metropolitan areas; percentage of bridges that have a condition rating of good or better; dollar amounts deposited to the state highway fund and disbursements from the fund compared to the amounts forecasted; and percentage of lane miles on the state highway system that have a pavement condition rating of good or better. The department must update the information regarding performance measures at least annually.

Under §16.203(e), Annual report, the department must annually compile and evaluate the information provided for the performance measures and publish a report describing the results. Section 16.203(f) requires the department to make copies of the annual reports available to each member of the legislature, and §16.203(g) requires the department to provide copies to the lieutenant governor, the speaker of the house of representatives, and the chair of the standing committee of each house of the legislature with primary jurisdiction over transportation issues.

Section 16.204, Reporting System for Funding and Expenditures, requires the department to develop an account information reporting system for tracking money deposited to the state highway fund. The account information will include the source and amount of deposited funds; the amount and general type or purpose of expenditure; and the balance credited to each account and subaccount of the state highway fund. The account information will be updated at least quarterly.

Section 16.205, Department Information Consolidation, authorizes the department, to the extent practicable and to avoid duplication of reporting requirements, to combine the reports required by this subchapter.

The effective date for these rules is January 1, 2011.

COMMENTS

No comments on the proposed new sections were received.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§16.1 - 16.4

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.601, 201.602, 201.608, 201.609, 201.616, 201.805, and 201.806.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005043
Bob Jackson
General Counsel
Texas Department of Transportation
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Proposal publication date: June 11, 2010
For further information, please call: (512) 463-8683

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SUBCHAPTER B. TRANSPORTATION PLANNING

43 TAC §§16.51 - 16.56

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.601, 201.602, 201.608, 201.609, 201.616, 201.805, and 201.806.

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SUBCHAPTER C. TRANSPORTATION PROGRAMS

43 TAC §§16.101 - 16.105

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.601, 201.602, 201.608, 201.609, 201.616, 201.805, and 201.806.

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SUBCHAPTER D. TRANSPORTATION FUNDING

43 TAC §§16.151 - 16.160

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.601, 201.602, 201.608, 201.609, 201.616, 201.805, and 201.806.

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SUBCHAPTER E. PROJECT AND PERFORMANCE REPORTING

43 TAC §§16.201 - 16.205

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.601, 201.602, 201.608, 201.609, 201.616, 201.805, and 201.806.

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CHAPTER 21. RIGHT OF WAY

SUBCHAPTER C. UTILITY ACCOMMODATION

43 TAC §21.37

The Texas Department of Transportation (department) adopts amendments to §21.37, Design, concerning utility accommodation. The amendments to §21.37 are adopted without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 5006) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Current rules provide that the utility company is responsible for the installation, adjustment, or relocation of their utility facilities. Some individuals have read this provision to prevent the department from procuring the design for the utility facility adjustment or relocation on behalf of a utility company. A utility company's performance of the work has sometimes caused delays on transportation construction projects. Amendments to §21.37 provide that the department and the utility company may agree to have the department procure the design of an adjustment or relocation. The amendments provide the procedure to be followed for such a procurement. The procedure allows the department to pay costs associated with a relocation or adjustment directly to the entity performing the work instead of reimbursing the utility company for the costs. The amendments provide for a streamlined, efficient procurement process that allows for the potential of reduced costs, especially when small adjustments or relocations are combined into one procurement. In addition the procedure may reduce the burden on small utility companies by reducing their use of in-house resources or the necessity of procuring independent outside consultants.

Section 21.37(a) is amended by deleting the language that stated that the utility was responsible for the design of any installation, adjustment, or relocation of a utility facility. Similar language is added in a new subsection (g)(1) with clarification that while the utility is responsible, it is not required to do or procure the work itself.

In addition, language requiring the department to review the design to preserve the safety and the integrity of the highway system is amended to provide a general requirement that the design measures must be taken to ensure that the utility facility does not affect safety, traffic, structural integrity of the highway, ease of maintenance, appearance of the highway and the integrity of the utility facility. Requiring the department to review the design is not necessary if the department procures the design work.

Section 21.37(b)(5) is amended to make a general requirement to ensure that the proposed installation is compatible with existing and approved future utility facilities. The existing language places this responsibility on the utility. Under the amendment, if the department procures the design, the department would need to ensure compatibility.

Section 21.37(c) is amended to conform to the other amendments. The new language maintains the current requirements but removes the specific reference to the utility, making the requirement generally applicable to the entity procuring the work.

The amendments add new §21.37(g) which clarifies that the department and utility company may agree to allow the department to procure the design for a utility relocation or adjustment under limited circumstances.

Subsection (g)(1) maintains the current provision that the utility is responsible for design of the installation, adjustment, or relocation of a utility facility.

Section 21.37(g)(2) provides that on communication, water, and waste water facility projects that are 100% reimbursable and on certain small electrical service distribution facility projects that are 100% reimbursable, the utility may authorize the department to procure the design and include the resulting plan in the construction contract. The amendments do not authorize the department to provide services to the utility that are not the financial responsibility of the state. The language also limits this procedure to the types of utilities the department is capable of procuring. The department will not procure the adjustment or relocation of large electrical utility facilities because of the extraordinary safety factors associated with that type of facility.

Section 21.37(g)(3) provides that if the department procures the design, the department must use an engineering firm approved by the utility and that department staff cannot provide the engineering services. These provisions ensure the utility, which remains responsible for the utility facility adjustment or relocation, does not surrender total control of the project to the department.

Section 21.37(g)(4) requires that the utility approve the design prior to the plan being included in the construction contract. Again this provision allows the utility oversight authority over the final design product. The amendment also states that the utility is responsible for ensuring that the design and construction meet all regulatory and environmental requirements. The utility is not able to pass that responsibility to the department.

Section 21.37(g)(5) details provisions that must be included in the agreement between the department and the utility. The agreement must provide for concurrent construction inspection by the utility and final acceptance by the utility when the project is complete. These provisions ensure that the utility has the opportunity to inspect the project to determine compliance during the project and that the utility take full responsibility of the utility at the conclusion of the project. The agreement may contain other provisions.

Section 21.37(g)(6) clarifies that responsibility for continued utility service remains with the utility company during the design and construction of an adjustment or relocation and that the department is not responsible for providing the services to end users of the utility company during those phases of the project.

Section 21.37(g)(7) provides that the utility is responsible for any ongoing maintenance after the completion of the construction work. The department's involvement in procuring the design and the construction of the utility relocation or adjustment does not include any future maintenance responsibilities.

Section 21.37(g)(8) provides that the department will reimburse the utility for expenses incurred under the project. This provision applies only to projects that are 100% reimbursable and includes the expenses incurred by the utility in reviewing and inspecting the design.

Section 21.37(g)(9) provides that all other provisions of 43 TAC Chapter 21, Subchapter C apply to the design and construction of a project handled by the department. The design must comply with development of standard plans, specifications, and estimates for the detailed scope of an adjustment or relocation. This language is included so that it is clear that regardless of who procures the design of the project the requirements of the subchapter must be met.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which provides the commission with the authority to adopt rules to implement Transportation Code, Chapter 203, Subchapter E, which authorizes the relocation of utility facilities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 203, Subchapter E.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 217. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.28

The Texas Department of Motor Vehicles (department) adopts amendments to §217.28, Specialty License Plates, Symbols, Tabs, and Other Devices. The amendments to §217.28 are adopted with changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6503).

EXPLANATION OF ADOPTED AMENDMENTS

The amendments are necessary to continue the implementation of Transportation Code, Chapter 504, as amended by Senate Bill 1616, 81st Legislature, Regular Session, 2009, concerning the development of new specialty license plates, including the new plate patterns.

The amendment to §217.28(c)(8)(B) adds the ability of the department to use the character of a heart in conjunction with a license plate number. Adding the symbol will give the public another symbol option to place on the plate. It is anticipated that reading this symbol will not create a problem for the automatic readers used by various state and local agencies for license plates as there have not been problems with similar symbols.

COMMENTS

No comments on the proposed amendments were received. A change has been made to §217.28(c)(3)(B) by adding a cross-reference to existing §217.44(c)(2)(E) which indicates that only one license plate is necessary for apportioned vehicles.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the Texas Motor Vehicles Board with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§504.004, 504.103, and 504.801 - 504.802.

§217.28. Specialty License Plates, Symbols, Tabs, and Other Devices.

(a) Purpose and Scope. Transportation Code, Chapter 504 charges the department with the responsibility of issuing a plate or plates, symbols, tabs, or other devices that, when attached to a vehicle as prescribed by the department, act as the legal registration insignia for the period issued. In addition, Transportation Code, Chapter 504 charges the department with providing specialty license plates, symbols, tabs, and other devices. For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures for the application, issuance, and renewal of specialty license plates, symbols, tabs, and other devices, through the county tax assessor-collectors, and establishes application fees, expiration dates, and registration periods for certain specialty license plates.

(b) Initial application for specialty license plates, symbols, tabs, or other devices.

(1) Application Process.

(A) Procedure. An owner of a vehicle registered as specified in §217.22 of this subchapter (relating to Motor Vehicle Registration) who wishes to apply for a specialty license plate, symbol, tab, or other device must do so on a form prescribed by the director.

(B) Form requirements. The application form shall at a minimum require the name and complete address of the applicant.

(2) Fees and Documentation.

(A) The application must be accompanied by the prescribed registration fee, unless exempted by statute.

(B) The application must be accompanied by the statutorily prescribed specialty license plate fee. In accordance with Acts of the 80th Legislature, Regular Session, 2007, Chapter 1166, Section 14, the fees for Legion of Merit license plates issued under Transportation Code, §504.316 are determined under Transportation Code, §504.3015(a). If a registration period is greater than 12 months, the expiration date of a specialty license plate, symbol, tab, or other device will be aligned with the registration period and the specialty plate fee will be adjusted to yield the appropriate fee. If the statutory annual fee for a specialty license plate is $5.00 or less, it will not be prorated.

(C) Specialty license plate fees will not be refunded after an application is submitted and the department has approved issuance of the license plate.

(D) The application must be accompanied by prescribed local fees or other fees that are collected in conjunction with registering a vehicle, with the exception of vehicles bearing license plates that are exempt by statute from these fees.

(E) The application must include evidence of eligibility for any specialty license plates. The evidence of eligibility may include, but is not limited to:

(i) an official document issued by a governmental entity;

(ii) a letter issued by a governmental entity on that agency's letterhead;

(iii) discharge papers; or

(iv) a death certificate.

(F) Initial applications for license plates for display on Exhibition Vehicles must include a photograph of the completed vehicle.

(3) Place of application. Applications for specialty license plates may be made directly to the county tax assessor-collector, except that applications for the following license plates must be made directly to the department:

(A) Congressional Medal of Honor;

(B) County Judge;

(C) Federal Administrative Law Judge;

(D) State Judge;

(E) State Official;

(F) U.S. Congress--House;

(G) U.S. Congress--Senate;

(H) U.S. Judge; and

(I) Legion of Valor.

(4) Gift plates.

(A) A person may purchase general distribution specialty license plates as a gift for another person if the purchaser submits an application for the specialty license plates that provides:

(i) the name and address of the person who will receive the plates; and

(ii) the vehicle identification number of the vehicle on which the plates will be displayed.

(B) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502 and this subchapter.

(c) Initial issuance of specialty license plates, symbols, tabs, or other devices.

(1) Issuance. On receipt of a completed initial application for registration, accompanied by the prescribed documentation and fees, the department will issue specialty license plates, symbols, tabs, or other devices to be displayed on the vehicle for which the license plates, symbols, tabs, or other devices were issued for the current registration period. If the vehicle for which the specialty license plates, symbols, tabs, or other devices are issued is currently registered, the owner must surrender the license plates currently displayed on the vehicle, along with the corresponding license receipt, before the specialty license plates may be issued.

(2) Exhibition Vehicle, Classic Motor Vehicle, and Classic Travel Trailer.

(A) License plates. Texas license plates that were issued the same year as the model year of an Exhibition Vehicle, Classic Motor Vehicle, or Classic Travel Trailer, may be displayed on that vehicle under Transportation Code, §§504.501, 504.5011, and 504.502, unless:

(i) the license plate's original use was restricted by statute to another vehicle type; or

(ii) the license plate is a qualifying plate type that originally required the owner to meet one or more eligibility requirements.

(B) Validation stickers and tabs. The department will issue validation stickers and tabs for display on license plates that are displayed as provided by subparagraph (A) of this paragraph.

(3) Number of plates issued.

(A) Two plates. Unless otherwise listed in subparagraph (B) of this paragraph, two specialty license plates, each bearing the same license plate number, will be issued per vehicle.

(B) One plate. One license plate will be issued per vehicle for all motorcycles and for the following specialty license plates:

(i) Antique Vehicle;

(ii) Classic Travel Trailer;

(iii) Cotton Vehicle;

(iv) Disaster Relief;

(v) Forestry Vehicle;

(vi) Golf Cart;

(vii) Log Loader;

(viii) Military Vehicle;

(ix) Parade; and

(x) apportioned vehicle in accordance with §217.44(c)(2)(E) of this subchapter (relating to Registration Reciprocity Agreements).

(C) Registration number. The identification number assigned by the military may be approved as the registration number instead of displaying Military Vehicle license plates on a former military vehicle.

(4) Assignment of plates.

(A) Title holder. Unless otherwise exempted by law or this section, the vehicle on which specialty license plates, symbols, tabs, or other devices is to be displayed shall be titled in the name of the person to whom the specialty license plates, symbols, tabs, or other devices is assigned, or a certificate of title application shall be filed in that person's name at the time the specialty license plates, symbols, tabs, or other devices are issued.

(B) Non-owner vehicle. If the vehicle is titled in a name other than that of the applicant, the applicant must provide evidence of having the legal right of possession and control of the vehicle.

(C) Leased vehicle. In the case of a leased vehicle, the applicant must provide a copy of the lease agreement verifying that the applicant currently leases the vehicle.

(5) Classification of neighborhood electric vehicles. The registration classification of a neighborhood electric vehicle, as defined by §217.3(a)(3) of this chapter (relating to Motor Vehicle Certificates of Title) will be determined by whether it is designed as a 4-wheeled truck or a 4-wheeled passenger vehicle.

(6) Number of vehicles. An owner may obtain specialty license plates, symbols, tabs, or other devices for an unlimited number of vehicles, unless the statute limits the number of vehicles for which the specialty license plate may be issued.

(7) Other classes of vehicle. A specialty license plate design may be varied to accommodate its use on motor vehicles other than

passenger cars and light trucks. The department will determine whether a specialty license plate will be made available for one or more classes of vehicles in addition to passenger cars and light trucks and, if so, to which class or classes. In making this determination, the department will consider the cost of redesigning a specialty license plate to accommodate another class of vehicle, the potential demand for that specialty license plate on that class of vehicle, and other factors bearing on the potential cost or benefit to the public of expanding the availability of a specialty license plate.

(8) Personalized plate numbers.

(A) Issuance. The executive director will issue a personalized license plate number subject to the exceptions set forth in this paragraph.

(B) Character limit. A personalized license plate number may contain no more than six alpha or numeric characters or a combination of characters. Depending upon the specialty license plate design and vehicle class, the number of characters may vary. Spaces, hyphens, periods, hearts, the International Symbol of Access, or silhouettes of the state of Texas may be used in conjunction with the license plate number.

(C) Personalized plates not approved. A personalized license plate number will not be approved by the executive director if the alpha-numeric pattern:

(i) conflicts with the department's current or proposed regular license plate numbering system;

(ii) would violate §217.22(c)(3) of this subchapter as determined by the executive director; or

(iii) is currently issued to another owner.

(D) Classifications of vehicles eligible for personalized plates. Unless otherwise listed in subparagraph (E) of this paragraph, personalized plates are available for all classifications of vehicles.

(E) Categories of plates for which personalized plates are not available. Personalized license plate numbers are not available for display on the following specialty license plates:

(i) Amateur Radio (other than the official call letters of the vehicle owner);

(ii) Antique Motorcycle;

(iii) Antique Vehicle;

(iv) Apportioned;

(v) Congressional Medal of Honor;

(vi) Cotton Vehicle;

(vii) Disabled Veteran;

(viii) Disaster Relief;

(ix) Farm Trailer (except Go Texan II);

(x) Farm Truck (except Go Texan II);

(xi) Farm Truck Tractor (except Go Texan II);

(xii) Fertilizer;

(xiii) Forestry Vehicle;

(xiv) Log Loader;

(xv) Machinery;

(xvi) Parade;

(xvii) Permit;

(xviii) Rental Trailer;

(xix) Soil Conservation; and

(xx) Texas Guard.

(F) Fee. Unless specified by statute, a personalized license plate fee of $40 will be charged in addition to any prescribed specialty license plate fee.

(G) Priority. Once a personalized license plate number has been assigned to an applicant, the owner shall have priority to that number for succeeding years if a timely renewal application is submitted to the county tax assessor-collector each year in accordance with subsection (d) of this section.

(d) Specialty license plate renewal.

(1) Renewal deadline. If a personalized license plate is not renewed within 60 days after its expiration date, a subsequent renewal application will be treated as an application for new personalized license plates.

(2) Length of validation. With the following exceptions, all specialty license plates, symbols, tabs, or other devices shall be valid for 12 months from the month of issuance or for a prorated period of at least 12 months coinciding with the expiration of registration.

(A) Five year period. The following license plates and registration numbers are issued for a five-year period:

(i) Antique Vehicle and Antique Motorcycle license plates and Antique tabs;

(ii) Military Vehicle license plates and registration numbers;

(iii) Parade license plates; and

(iv) Foreign Organization license plates.

(B) March expiration dates. The following license plates expire each March 31:

(i) Congressional Medal of Honor;

(ii) Cotton Vehicle; and

(iii) Disaster Relief.

(C) June expiration dates. Honorary Consul license plates expire each June 30.

(D) September expiration dates. Log Loader license plates expire each September 30.

(E) December expiration dates. The following license plates expire each December 31:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(F) Except as otherwise provided in this paragraph, if a vehicle's registration period is other than 12 months, the expiration

date of the specialty license plate, symbol, tab, or other device will be set to align it with the expiration of registration.

(3) Renewal.

(A) Renewal notice. Approximately 60 days before the expiration date of a specialty license plate, symbol, tab, or other device, the department will send each owner a renewal notice that includes the amount of the specialty plate fee and the registration fee.

(B) Return of notice. The owner must return the fee and any prescribed documentation to the tax assessor-collector of the county in which the owner resides, except that the owner of a vehicle with one of the following license plates must return the documentation and specialty license plate fee directly to the department and submit the registration fee to the county tax assessor-collector:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(C) Return of documents. The owner of a vehicle with Congressional Medal of Honor license plates must return the documentation and specialty license plate fee, if any, directly to the department.

(D) Expired plate numbers. The department will retain a specialty license plate number for 60 days after the expiration date of the plates if the plates are not renewed on or before their expiration date. After 60 days the number may be reissued to a new applicant. All specialty license plate renewals received after the expiration of the 60 days will be treated as new applications.

(E) Issuance of validation insignia. On receipt of a completed license plate renewal application and prescribed documentation, the department will issue registration validation insignia as specified in §217.22 of this subchapter, except for those plates listed in clause (i) or (ii) of this subparagraph or unless this section or other law requires the issuance of new license plates to the owner.

(i) New license plates will be issued when the following specialty license plates are renewed:

(I) Antique Motorcycle;

(II) Antique Vehicle;

(III) Congressional Medal of Honor;

(IV) County Judge;

(V) Disaster Relief;

(VI) Federal Administrative Law Judge;

(VII) Military Vehicle;

(VIII) Parade;

(IX) State Judge;

(X) State Official;

(XI) U.S. Congress--House;

(XII) U.S. Congress--Senate; and

(XIII) U.S. Judge.

(ii) New license plates shall be issued at no extra cost every seven years from the date of issuance for specialty license plates and renewed personalized license plates, in accordance with the provisions of §217.22 of this subchapter.

(F) Lost or destroyed renewal notices. If a renewal notice is lost, destroyed, or not received by the vehicle owner, the specialty license plates, symbol, tab, or other device may be renewed if the owner provides acceptable personal identification along with the appropriate fees and documentation. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(e) Transfer of specialty license plates.

(1) Transfer between vehicles.

(A) Transferable between vehicles. The owner of a vehicle with specialty license plates, symbols, tabs, or other devices may transfer the specialty plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(i) is titled or leased in the owner's name; and

(ii) meets the vehicle classification requirements for that particular specialty license plate, symbol, tab, or other device.

(B) Non-transferable between vehicles. The following specialty license plates, symbols, tabs, or other devices are non-transferable between vehicles:

(i) Antique Vehicle license plates, Antique Motorcycle license plates, and Antique tabs;

(ii) Military Vehicle license plates and registration numbers;

(iii) Classic Auto, Classic Truck, Classic Motorcycle, and Classic Travel Trailer license plates;

(iv) Parade license plates;

(v) Forestry Vehicle license plates; and

(vi) Log Loader license plates.

(C) New specialty license plates. If the department creates a new specialty license plate under Transportation Code, §504.801, the department will specify at the time of creation whether the license plate may be transferred between vehicles.

(2) Transfer between owners.

(A) Non-transferable between owners. Specialty license plates, symbols, tabs, or other devices issued under Transportation Code, Chapter 504, Subchapters B and G, may not be transferred between persons. Specialty license plates, symbols, tabs, or other devices issued under Transportation Code, Chapter 504, Subchapters C, D, E, and F are not transferable from one person to another except as specifically permitted by statute.

(B) New specialty license plates. If the department creates a new specialty license plate under Transportation Code, §504.801, the department will specify at the time of creation whether the license plate may be transferred between owners.

(3) Simultaneous transfer between owners and vehicles. Specialty license plates, symbols, tabs, or other devices are transferable between owners and vehicles simultaneously only if the owners and vehicles meet all the requirements in both paragraphs (1) and (2) of this subsection.

(f) Replacement.

(1) Application. When specialty license plates, symbols, tabs, or other devices are lost, stolen, or mutilated, the owner shall apply directly to the county tax assessor-collector for the issuance of replacements, except that Log Loader license plates must be reapplied for and accompanied by the prescribed fees and documentation.

(2) Interim replacement tags. If the specialty license plate, symbol, tab, or other device is lost, destroyed, or mutilated to such an extent that it is unusable, and if issuance of a replacement license plate would require that it be remanufactured, the owner must pay the statutory replacement fee, and the department will issue a temporary tag for interim use. The owner's new specialty license plate number will be shown on the temporary tag unless it is a personalized license plate, in which case the same personalized license plate number will be shown.

(3) Stolen specialty license plates. The county tax assessor-collector will not approve the issuance of replacement license plates with the same personalized license plate number when the department's records indicate that the vehicle displaying the personalized license plates, symbols, tabs, or other devices or the license plates, symbols, tabs, or other devices themselves were reported as stolen. On expiration or recovery of the stolen vehicle or license plates, symbols, tabs, or other devices, the department will issue, at the owner's request, replacement license plates, symbols, tabs, or other devices bearing the same personalized number as those that were stolen.

(g) License plates created after January 1, 1999. In accordance with Transportation Code, §504.702, the department will begin to issue specialty license plates authorized by a law enacted after January 1, 1999, only if the sponsoring entity for that license plate submits the following items before the fifth anniversary of the effective date of the law.

(1) The sponsoring entity must submit a written application. The application must be on a form approved by the director and include, at a minimum:

(A) the name of the license plate;

(B) the name and address of the sponsoring entity;

(C) the name and telephone number of a person authorized to act for the sponsoring entity; and

(D) the deposit or license plate fees set forth in paragraph (2) of this subsection.

(2) The written request must be accompanied by:

(A) a deposit in the amount of $8,000 in the form of a single payment, made payable to the Texas Department of Motor Vehicles; or

(B) if the license plates are presold, the prescribed number of properly executed applications for that license plate accompanied by a single payment, made payable to the Texas Department of Motor Vehicles, in an amount equal to the prescribed fees for issuance of those license plates; or

(C) if the sponsoring entity submits less than the prescribed number of properly executed applications for that license plate accompanied by a single payment, a deposit made payable to the Texas Department of Motor Vehicles, that consists of:

(i) the prescribed license plate fees for those applications submitted; and

(ii) a deposit equal to $8,000 less the prescribed portion of those license plate fees to be retained by the department, and deposited to the State Highway Fund, for issuance of the license plates for which applications are submitted.

(3) The deposit submitted to the department under paragraph (2)(A) or (C) of this subsection will be returned to the sponsoring entity only if the prescribed number of sets of the applicable license are issued or presold.

(4) A sponsoring entity is not an agent of the department and does not act for the department in any matter, and the department does not assume any responsibility for fees or applications collected by a sponsoring entity.

(h) Assignment procedures for state, federal, and county officials.

(1) State Officials. State Official license plates contain the prefix "SO" and are assigned in the following order:

(A) Governor;

(B) Lieutenant Governor;

(C) Speaker of the House;

(D) Attorney General;

(E) Comptroller;

(F) Land Commissioner;

(G) Agriculture Commissioner;

(H) Secretary of State;

(I) Railroad Commission Presiding Officer followed by the remaining members based on their seniority;

(J) Supreme Court Chief Justice followed by the remaining justices based on their seniority;

(K) Criminal Court of Appeals Presiding Judge followed by the remaining judges based on their seniority;

(L) Members of the State Legislature, with Senators assigned in order of district number followed by Representatives assigned in order of district number, except that in the event of redistricting, license plates will be reassigned; and

(M) Board of Education Presiding Officer followed by the remaining members assigned in district number order, except that in the event of redistricting, license plates will be reassigned.

(2) Members of the U.S. Congress.

(A) U.S. Senate license plates contain the prefix "Senate" and are assigned by seniority; and

(B) U.S. House license plates contain the prefix "House" and are assigned in order of district number, except that in the event of redistricting, license plates will be reassigned.

(3) Federal Judge.

(A) Federal Judge license plates contain the prefix "USA" and are assigned on a seniority basis within each court in the following order:

(i) Judges of the Fifth Circuit Court of Appeals;

(ii) Judges of the United States District Courts;

(iii) United States Bankruptcy Judges; and

(iv) United States Magistrates.

(B) Federal Administrative Law Judge plates contain the prefix "US" and are assigned in the order in which applications are received.

(C) A federal judge who retired on or before August 31, 2003, and who held license plates expiring in March 2004 may continue to receive federal judge plates. A federal judge who retired after August 31, 2003, is not eligible for U.S. Judge license plates.

(4) State Judge.

(A) State Judge license plates contain the prefix "TX" and are assigned sequentially in the following order:

(i) Appellate District Courts;

(ii) Presiding Judges of Administrative Regions;

(iii) Judicial District Courts;

(iv) Criminal District Courts; and

(v) Family District Courts and County Statutory Courts.

(B) A particular alpha-numeric combination will always be assigned to a judge of the same court to which it was originally assigned.

(C) A state judge who retired on or before August 31, 2003, and who held license plates expiring in March 2004 may continue to receive state judge plates. A state judge who retired after August 31, 2003, is not eligible for State Judge license plates.

(5) County Judge license plates contain the prefix "CJ" and are assigned by county number.

(6) In the event of redistricting or other plate reallocation, the department may allow a state official to retain that official's plate number if the official has had the number for five or more consecutive years.

(i) Development of new specialty license plates.

(1) Procedure. The following procedure governs the process of authorizing new specialty license plates under Transportation Code, §504.801 whether the new license plate originated as a result of an application or as a department initiative.

(2) Applications for the creation of new specialty license plates. An applicant for the creation of a new specialty license plate, other than a vendor specialty plate under §217.40 of this subchapter (relating to Marketing of Specialty License Plates through a Private Vendor), must submit a written application on a form approved by the executive director. The application must include:

(A) the applicant's name, address, telephone number, and other identifying information as directed on the form;

(B) certification on Internal Revenue Service letterhead stating that the applicant is a not-for-profit entity, and that the applicant's non-profit status is current at the time of application;

(C) a draft design of the specialty license plate;

(D) projected sales of the plate, including an explanation of how the projected figure was established;

(E) a marketing plan for the plate, including a description of the target market;

(F) a licensing agreement from the appropriate third party for any intellectual property design or design element;

(G) a letter from the executive director of the sponsoring state agency stating that the agency agrees to receive and distribute revenue from the sale of the specialty license plate and that the use of the funds will not violate a statute or constitutional provision; and

(H) other information necessary for the Board to reach a decision regarding approval of the requested specialty plate.

(3) Review process. The Board:

(A) will not consider incomplete applications;

(B) may request additional information from an applicant if necessary for a decision; and

(C) will consider specialty license plate applications that are restricted by law to certain individuals or groups of individuals (qualifying plates) using the same procedures as applications submitted for plates that are available to everyone (non-qualifying plates).

(4) Request for additional information. If the Board determines that additional information is needed, the applicant must return the requested information not later than the requested due date. If the additional information is not received by that date, the Board will return the application as incomplete unless the Board:

(A) determines that the additional requested information is not critical for consideration and approval of the application; and

(B) approves the application, pending receipt of the additional information by a specified due date.

(5) Board decision. The Board's decision will be based on:

(A) compliance with Transportation Code, §504.801;

(B) the proposed license plate design, including:

(i) whether the design appears to meet the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness;

(iii) other information provided during the application process;

(iv) the criteria designated in §217.22(c)(3)(B) of this subchapter as applied to the design; and

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(C) the applicant's ability to comply with Transportation Code, §504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

(6) Public comment on proposed design. All proposed plate designs will be considered by the Board as an agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet web site to receive public comment at least 20 days in advance of the meeting at which it will be considered. The department will notify all other specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet website for submission of comments. Written comments are welcome and must be

received by the department at least 7 days in advance of the meeting. Public comment will be received at the Board's meeting.

(7) Final approval.

(A) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter at an open meeting.

(B) Application not approved. If the application is not approved under subparagraph (A) of this paragraph, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(i) the applicant has additional, required documentation; or

(ii) the design has been altered to an acceptable degree.

(8) Issuance of specialty plates.

(A) If the specialty license plate is approved, the applicant must comply with Transportation Code, §504.702 before any further processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or license plate specifications.

(C) If the Board, in consultation with the applicant, adjusts or reconfigures the design, the adjusted or reconfigured design will not be posted on the department's website for additional comments.

(9) Redesign of specialty license plate.

(A) Upon receipt of a written request from the applicant, the department will allow redesign of a specialty license plate.

(B) A request for a redesign must meet all application requirements and proceed through the approval process of a new specialty plate as required by this subsection.

(C) An approved license plate redesign does not require the deposit required by Transportation Code, §504.702, but the applicant must pay a redesign cost to cover administrative expenses.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 26, 2010.

TRD-201005009
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Effective date: September 15, 2010
Proposal publication date: July 23, 2010
For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Banking

Title 7, Part 2

On behalf of the Finance Commission of Texas, the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, the following chapter of Texas Administrative Code, Title 7, in its entirety:

Chapter 11 (Miscellaneous), comprised of §11.37.

The review is conducted pursuant to Government Code, §2001.039. Comments regarding the review of this chapter, and whether the reasons for initially adopting the section under review continue to exist, will be accepted for 30 days following the publication of this notice in the *Texas Register*.

Any questions or written comments pertaining to this notice of intention to review should be directed to Kaylene Ray, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705, or e-mailed to legal@dob.texas.gov.

Any proposed changes to this section as a result of the rule review will be published as a proposed rule in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-201005156
A. Kaylene Ray
General Counsel
Texas Department of Banking
Filed: September 1, 2010

♦ ♦ ♦

On behalf of the Finance Commission of Texas, the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, the following chapter of Texas Administrative Code, Title 7, in its entirety:

Chapter 26 (Perpetual Care Cemeteries), comprised of §§26.1 - 26.4, 26.11, and 26.12.

The review is conducted pursuant to Government Code, §2001.039. Comments regarding the review of this chapter, and whether the reasons for initially adopting the sections under review continue to exist, will be accepted for 30 days following the publication of this notice in the *Texas Register*.

Any questions or written comments pertaining to this notice of intention to review should be directed to Kaylene Ray, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705, or e-mailed to legal@dob.texas.gov.

Any proposed changes to these sections as a result of the rule review will be published as proposed rules in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-201005157
A. Kaylene Ray
General Counsel
Texas Department of Banking
Filed: September 1, 2010

♦ ♦ ♦

On behalf of the Finance Commission of Texas, the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, the following chapter of Texas Administrative Code, Title 7, in its entirety:

Chapter 27 (Applications), comprised of §27.1.

The review is conducted pursuant to Government Code, §2001.039. Comments regarding the review of this chapter, and whether the reasons for initially adopting the section under review continue to exist, will be accepted for 30 days following the publication of this notice in the *Texas Register*.

Any questions or written comments pertaining to this notice of intention to review should be directed to Kaylene Ray, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705, or e-mailed to legal@dob.texas.gov.

Any proposed changes to this section as a result of the rule review will be published as a proposed rule in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-201005158
A. Kaylene Ray
General Counsel
Texas Department of Banking
Filed: September 1, 2010

♦ ♦ ♦

On behalf of the Finance Commission of Texas, the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, the following chapter of Texas Administrative Code, Title 7, in its entirety:

Chapter 31 (Private Child Support Enforcement Agencies), comprised of Subchapter A (§31.1); Subchapter B (§§31.11 - 31.19); Subchapter C (§§31.31 - 31.34 and §§31.36 - 31.39); Subchapter D (§§31.51 - 31.56); Subchapter E (§§31.71 - 31.76); Subchapter F (§§31.91 - 31.96); and Subchapter G (§§31.111 - 31.115).

The review is conducted pursuant to Government Code, §2001.039. Comments regarding the review of this chapter, and whether the reasons for initially adopting the sections under review continue to exist, will be accepted for 30 days following the publication of this notice in the *Texas Register*.

Any questions or written comments pertaining to this notice of intention to review should be directed to Kaylene Ray, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705, or e-mailed to legal@dob.texas.gov.

Any proposed changes to these sections as a result of the rule review will be published as proposed rules in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-201005159
A. Kaylene Ray
General Counsel
Texas Department of Banking
Filed: September 1, 2010

♦ ♦ ♦

Office of Consumer Credit Commissioner

Title 7, Part 5

The Finance Commission of Texas (commission) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Part 5, Chapter 86, concerning Retail Creditors. Chapter 86 contains Subchapter A, concerning Registration of Retail Creditors. Subchapter A consists of §86.101, concerning Consumer Notifications and §86.102, concerning Annual Registration Fees.

This rule review will be conducted pursuant to Texas Government Code, §2001.039. The commission will accept comments for 31 days following publication of this notice in the *Texas Register* as to whether the reasons for adopting these rules continue to exist.

The Office of Consumer Credit Commissioner, which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by email to laurie.hobbs@occc.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 31-day public comment period prior to final adoption or repeal by the commission.

TRD-201005148
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 1, 2010

♦ ♦ ♦

Finance Commission of Texas

Title 7, Part 1

The Finance Commission of Texas (commission) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Part 1, Chapter 9, concerning Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings. Chapter 9 contains Subchapter A, concerning General; Subchapter B, concerning Contested Case Hearings; Subchapter C, concerning Appeals to Finance Commission; Subchapter D, concerning Court Appeals; and Subchapter E, concerning Rulemaking.

This rule review will be conducted pursuant to Texas Government Code, §2001.039. The commission will accept comments for 31 days following publication of this notice in the *Texas Register* as to whether the reasons for adopting these rules continue to exist.

The commission believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by email to laurie.hobbs@occc.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 31-day public comment period prior to final adoption or repeal by the commission.

TRD-201005150
Leslie L. Pettijohn
Executive Director
Finance Commission of Texas
Filed: September 1, 2010

♦ ♦ ♦

Adopted Rule Reviews

Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy adopts the review of Chapter 281 (§§281.1 - 281.11, 281.13, 281.15, 281.17 - 281.22, 281.30 - 281.34, and 281.60 - 281.66), concerning Administrative Practices and Procedures, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5583).

No comments were received.

The agency finds the reason for adopting the rules continues to exist.

TRD-201004965
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: August 25, 2010

♦ ♦ ♦

The Texas State Board of Pharmacy adopts the review of Chapter 311 (§311.1 and §311.2), concerning Code of Conduct, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5583).

No comments were received.

The agency finds the reason for adopting the rules continues to exist.

TRD-201004966

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: August 25, 2010

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 28 TAC §21.4506(f)

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Figure: 43 TAC §9.111(c)

Guidelines for Application of Sanctions based on Grounds and Factors

Ground for Sanction	Sanction			
	Reprimand	Prohibition from entering into a specified agreement	Limit on contract amount	Debarment
§10.101(4) relating to maintaining good standing	allowable with written explanation of justification	allowable with written explanation of justification	allowable with written explanation of justification	recommended
§10.101(3) relating to adherence to civil and criminal laws	allowable with written explanation of justification	allowable with written explanation of justification	recommended only if: • the contractor meets all mitigating factors listed in §9.110(c), and • the contractor has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	recommended if: • the contractor does not meet all mitigating factors listed in §9.110(c), or • the contractor has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions
§10.101(2) relating to offering, giving, or agreeing to give a benefit; §10.101(1) relating to conflicts of interest; §9.107(a)(1) relating to	allowable with written explanation of justification	recommended only if: • the contractor meets all of the mitigating factors of §9.110(c), and • the contractor has not committed similar acts or omissions, and	recommended only if: • the contractor meets some of the mitigating factors of §9.110(c), and • the contractor has not committed similar acts	recommended if: • the contractor meets no mitigating factors listed in §9.110(c), or • the contractor has committed similar acts or omissions, or

failure to execute a contract; or §9.107(a)(3) relating to contractor's declaration of default		• the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	• the seriousness and willfulness of the act or omission is not severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions
§10.101(5) relating to notifying the department; or §9.107(a)(2) relating to rejection of two or more bids	recommended only if: • the contractor meets all mitigating factors listed in §9.110(c), and • the contractor has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	recommended only if: • the contractor meets some of the mitigating factors of §9.110(c), and • the contractor has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the contractor, or a third party on behalf of the contractor, has fully compensated the department for any damages suffered by the department as a result of the contractor's acts or omissions	recommended if: • the contractor has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions	recommended only if: • the contractor has committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the contractor's acts or omissions

Figure: 43 TAC §10.155(b)

Guidelines for Selection of Score Reduction based on Grounds and Factors

Ground for Score Reduction	Recommended Percentage and Period of Score Reduction/Factors for Imposition			
	no more than 10% reduction for a time period of no more than 12 months	no more than 20% reduction for a time period of no more than 36 months	no more than 50% reduction for a time period of no more than 48 months	no more than 75% reduction for a time period of no more than 60 months
§10.101(4) relating to maintaining good standing	allowable with written explanation of justification	allowable with written explanation of justification	allowable with written explanation of justification	recommended
§10.101(3) relating to adherence to civil and criminal laws	allowable with written explanation of justification	allowable with written explanation of justification	recommended only if: • the provider meets all mitigating factors of §10.154(b) and • the provider has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	recommended if: • the provider does not meet all mitigating factors of §10.154(b), or • the provider has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the provider's acts or omissions
§10.101(1) relating to conflicts of interest; or §10.101(2) relating to offering, giving, or agreeing to give a benefit	allowable with written explanation of justification	recommended only if: • the provider meets all of the mitigating factors of §10.154(b), and • the provider has not committed similar acts or omissions, and	recommended only if: • the provider meets some of the mitigating factors of §10.154(b), and • the provider has not committed similar acts	recommended if: • the provider meets no mitigating factors of §10.154(b), or • the provider has committed similar acts or omissions, or

		• the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	• the seriousness and willfulness of the act or omission is not severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the provider's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: • the provider meets all mitigating factors of §10.154(b), and • the provider has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	recommended only if: • the provider meets some of the mitigating factors of §10.154(b), and • the provider has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the provider, or a third party on behalf of the provider, has fully compensated the department for any damages suffered by the department as a result of the provider's acts or omissions	recommended if: • the provider has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the provider's acts or omissions	recommended only if: • the provider has committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the provider's acts or omissions

Figure: 43 TAC §10.203(c)

Guidelines for Selecting Period of Prohibition based on Grounds and Factors

Ground for Removal of Precertification	Period of Prohibition from Reapplying for Precertification			
	no more than 12 months	no more than 36 months	no more than 48 months	no more than 60 months
§10.101(4) relating to maintaining good standing	allowable with written explanation of justification	allowable with written explanation of justification	allowable with written explanation of justification	recommended
§10.101(3) relating to adherence to civil and criminal laws	allowable with written explanation of justification	allowable with written explanation of justification	recommended only if: • the person meets all mitigating factors listed in §10.202(b) and • the person has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the person, has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	recommended if: • the person does not meet all mitigating factors listed in §10.202(b), or • the person has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the individual's acts or omissions
§10.101(2) relating to offering, giving, or agreeing to give a benefit; or §10.101(1) relating to conflicts of interest	allowable with written explanation of justification	recommended only if: • the person meets all of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and	recommended only if: • the person meets some of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and	recommended if: • the person meets no mitigating factors listed in §10.202(b), or • the person has committed similar acts or omissions, or • the seriousness and

		willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the individual, has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	• the seriousness and willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the person , has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	willfulness of the act or omission is not severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the individual's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: • the person meets all mitigating factors listed in §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the person , has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	recommended only if: • the person meets some of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person, or a third party on behalf of the person , has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	recommended if: • the person has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the person's acts or omissions	recommended only if: • the person has committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the person's acts or omissions

Figure: 43 TAC §10.255(c)

Guidelines for Application of Sanction based on Grounds and Factors

Ground for Sanction	Sanction			
	Reprimand	Prohibition from entering into a specified agreement	Limit on contract amount	Debarment
§10.101(4) relating to maintaining good standing	allowable with written explanation of justification	allowable with written explanation of justification	allowable with written explanation of justification	recommended
§10.101(3) relating to adherence to civil and criminal laws	allowable with written explanation of justification	allowable with written explanation of justification	recommended only if: • the entity meets all mitigating factors listed in §10.254(c), and • the entity has not committed similar acts or omissions and • the seriousness and willfulness of the act or omission is not severe, and • the entity, or a third party on behalf of the entity, has fully compensated the department for any damages suffered by the department as a result of the entity's acts or omissions	recommended if: • the entity does not meet all mitigating factors listed in §10.254(c), or • the entity has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the entity's acts or omissions
§10.101(2) relating to offering, giving, or agreeing to give a benefit; or §10.101(1) relating to conflicts of interest	allowable with written explanation of justification	recommended only if: • the entity meets all of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and • the seriousness and	recommended only if: • the entity meets some of the mitigating factors of §10.254(c), and • the entity has not committed similar acts or omissions, and	recommended if: • the entity meets no mitigating factors listed in §10.254(c), or • the entity has committed similar acts or omissions, or • the seriousness and

		willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the individual, has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	• the seriousness and willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the person , has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	willfulness of the act or omission is not severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the individual's acts or omissions
§10.101(5) relating to notifying the department	recommended only if: • the person meets all mitigating factors listed in §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person , or a third party on behalf of the person , has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	recommended only if: • the person meets some of the mitigating factors of §10.202(b), and • the person has not committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is not severe, and • the person, or a third party on behalf of the person , has fully compensated the department for any damages suffered by the department as a result of the individual's acts or omissions	recommended if: • the person has committed similar acts or omissions, or • the seriousness and willfulness of the act or omission is severe, or • the department has not been fully compensated for any damages suffered by the department as a result of the person's acts or omissions	recommended only if: • the person has committed similar acts or omissions, and • the seriousness and willfulness of the act or omission is severe, and • the department has not been fully compensated for any damages suffered by the department as a result of the person's acts or omissions

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Comptroller of Public Accounts

Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller) announces Amendment No. 2 of the contract awards described below.

The notice of Request for Qualifications was published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3459) (RFQ #183b). The Notice of Awards was published in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8413).

The contractors provide contract tax examination services to the Comptroller as authorized by Chapter 111, Subchapter A, §111.0045 of the Texas Government Code.

Contracts that were amended were awarded to the following persons/firms:

Jacqueline A. Muhammad d/b/a Alexander Consulting, P.O. Box 84469, Pearland, Texas 77584, is extended by Amendment No. 2. The extended term of the contract continues through August 31, 2011, with no options to renew.

Mark Steven Swinney d/b/a The Davis Swinney Group, P.O. Box 317, Rio Hondo, Texas 78583, is extended by Amendment No. 2. The extended term of the contract continues through August 31, 2011, with no options to renew.

State and Local Tax Group, LLC, 308 Cooper Drive, Hurst, Texas 76053, is extended by Amendment No. 2. The extended term of the contract continues through August 31, 2011, with no options to renew.

Willie L. Sullivan, Jr., 4530 Brookren Court, Pearland, Texas 77584, is extended by Amendment No. 2. The extended term of the contract continues through August 31, 2011, with no options to renew.

The total amount of each contract is based on the size of contract tax examination packages awarded by the Comptroller's Project Manager during the term of each contract. The original term of the contracts was September 1, 2008 through August 31, 2009. The contracts were subsequently amended by Amendment No. 1 to extend the respective terms from September 1, 2009 through August 31, 2010. Amendment No. 2 extends the term of the contracts through August 31, 2011.

TRD-201005146
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 1, 2010

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Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller) announces Amendment No. 1 of the contract awards described below.

The Comptroller's Request for Qualifications was published in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2823) (RFQ #192h). The Notice of Awards was published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6358).

The contractors provide tax examination services to the Comptroller as authorized by Chapter 111, Subchapter A, §111.0045 of the Texas Government Code.

Contracts that were amended were awarded to the following persons/firms:

Cindy Alvarez, 3820 Ashbury Lane, Bedford, Texas 76021, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

Sam W. Armstrong, P.C., 931 Kentbury Court, Katy, Texas 77450, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

Melanie C. Bowman and Wayne F. Bowman, 2225 Potomac Drive, Unit C, Houston, Texas 77057, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

Cindy H. Coats, CPA, 212 W. Legend Oaks Drive, Georgetown, Texas 78628-5003, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

Texas Tax Consulting Group, L.C., 6116 Ayers Street, Suite 2C, Corpus Christi, Texas 78415, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

Nedzra J. Ward, 11403 Kay Lane, Pearland, Texas 77584-7270, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

Gordon Wheeler, 8410 Neff Street, Houston, Texas 77036, is extended by Amendment No. 1. The extended term of the contract continues through August 31, 2011, with one (1) year option to renew.

The total amount of each contract is based on the size of contract tax examination packages awarded by the Comptroller's Project Manager during the term of each contract. The original term of the contracts was September 1, 2009 through August 31, 2010. Amendment No. 1, that is the subject of this notice, extends the term of the contract through August 31, 2011.

TRD-201005147
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 1, 2010

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Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, and §403.301 and §403.3011, Texas Government Code; and the Property Tax Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP #199a) from qualified, independent individuals and firms to provide consulting services to Comptroller. The successful respondent(s) will assist Comptroller in accurately estimating the fiscal impacts to state property tax-related legislation and related tasks for

the upcoming session of the Texas Legislature. Comptroller reserves the right to select multiple contractors to participate in conducting the reviews as set forth in the RFP. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about December 1, 2010, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th Street, Room 201, Austin, Texas 78774 (Issuing Office), telephone number: (512) 305-8673, to obtain a copy of the RFP. Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, September 10, 2010, after 10:00 a.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also made the complete RFP available electronically on the Electronic State Business Daily at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, September 10, 2010.

Non-Mandatory Letters of Intent and Questions: All Non-Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 463-3669, not later than 2:00 p.m. CZT, on September 17, 2010. Official responses to questions received by the foregoing deadline will be posted electronically on the Electronic State Business Daily no later than Friday, September 24, 2010, or as soon thereafter as practical. Non-Mandatory Letters of Intent or Questions received after the deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be received in the Assistant General Counsel's Office at the address specified above no later than 2:00 p.m. CZT, on Friday, October 22, 2010. Proposals received after this time and date will not be considered. Proposals will not be accepted from respondents that do not submit proposals by the foregoing deadline. Respondents shall be solely responsible for confirming the timely receipt of proposals in the Issuing Office.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision regarding the award of master contracts for assignments from the pool selected, if any. Comptroller reserves the right to award one or more contracts under this RFP. Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - September 10, 2010, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - September 17, 2010, 2:00 p.m. CZT; Official Responses to Questions Posted - September 24, 2010, or as soon thereafter as practical; Proposals Due - October 22, 2010, 2:00 p.m. CZT; Contract Execution - December 1, 2010, or as soon thereafter as practical; Commencement of Project Activities - December 1, 2010, or as soon thereafter as practical.

TRD-201005144
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 1, 2010

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, 303.008, 303.009, 304.003, and 346.101, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/06/10 - 09/12/10 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/06/10 - 09/12/10 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009[3] for the period of 09/01/10 - 09/30/10 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 09/01/10 - 09/30/10 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 10/01/10 - 12/31/10 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 10/01/10 - 12/31/10 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by §303.009[1] for the period of 10/01/10 - 12/31/10 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The lender credit card quarterly rate as prescribed by §346.101, Texas Finance Code[1] for the period of 10/01/10 - 12/31/10 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by §303.008 and §303.009[4] for the period of 10/01/10 - 12/31/10 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by §303.008 and §303.009 for the period of 10/01/10 - 12/31/10 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by §303.009[1] for the period of 10/01/10 - 12/31/10 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 09/01/10 - 09/30/10 is 5.00% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed §304.003 for the period of 09/01/10 - 09/30/10 is 5.00% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in §301.002(14), Texas Finance Code.

TRD-201005113
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 31, 2010

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Education Service Center, Region XIV

Request for Applications for the Learn and Serve Texas Grant Program

Filing Authority. This Request for Applications (RFA) is authorized under the National and Community Service Act of 1990, 42 USC 12521 et seq. (Learn and Serve America School-based Programs).

Eligible Applicants. Service Learning Texas (SLT), a statewide initiative of Region 14 Education Service Center (ESC) in collaboration with the Texas Education Agency, is requesting applications from public school districts, open enrollment charter schools, and shared services arrangements (SSAs) of public school districts and education service centers in Texas. Applicants must have at least two partners, one of which must include a private nonprofit community-based organization or government agency that has demonstrated expertise in meeting educational, environmental, public safety, or health and human needs. (If such an organization or agency does not exist in the community, applicants may partner with a nonprofit, not-for-profit, religious, or community organization.) In addition, the community-based organization must have been in existence for at least one year before the start of the program and must make service opportunities available to student participants. Subgrantee programs may also include partnerships with private for-profit businesses, private nonprofit schools, institutions of higher education, government agencies, individuals, and other organizations.

Description. Learn and Serve America: School-Based program grants are designed to assist in developing high-quality service-learning programs in elementary and secondary schools. Learn and Serve America supports school-based programs, composed of Local Education Agencies (LEAs) and their community partners, that provide youth with opportunities to learn and develop their capabilities through service-learning. Service-learning is an educational method which engages young people in service to their communities as a means of developing a lifelong ethic of service, enriching their academic learning, promoting personal growth, and helping them to develop the skills needed for productive citizenship. The goals of these grants are to fund programs that: (a) Encourage elementary and secondary school teachers to create, develop, and offer service-learning opportunities for all school-age youth; (b) Educate teachers about service-learning and incorporate service-learning opportunities into classrooms to enhance academic learning; (c) Coordinate the work of adult volunteers in school; (d) Introduce young people to a broad range of careers and expose them to further education and training; (e) Hire service-learning coordinators to assist with identifying community partners and implementing school-based service-learning programs; (f) Provide the technical assistance and information to facilitate the training of teachers who want to use service-learning in their classrooms; and (g) Assist local partnerships in the planning, development, and execution of service-learning projects.

The Learn and Serve Texas grant will continue to invest in programs that implement, expand, and sustain high-quality service-learning in Texas public school districts as part of a larger strategy to make service-learning a common experience for all Texas students. Subgrantees under this program are expected to: (1) Support high-quality service-learning--a form of instruction in which students design projects to address community needs as part of their academic studies--into K-12 schools, particularly those with large numbers of youth in disadvantaged circumstances, as a strategy to improve retention and graduation through increased civic and academic engagement; (2) Engage young people in service-learning activities that directly address community needs in order to build healthier communities; (3) Develop and maintain community partnerships that provide opportunities for student service-learning activities and student civic and academic engagement; (4) Engage young people in service-learning activities related to the Martin Luther King, Jr., national Day of Service (www.mlkday.gov) on the third Monday in January; (5) Increase civic and academic engagement of participating students; (6) Increase the number and percentage of teachers who use service-learning to meet educational goals; (7) Improve the quality of service-learning through the LEADERS model of service-learning and the K-12 Standards for High-Quality Practice; (8) Sustain and institutionalize service-learning in participating districts through administrative leadership, supportive policies and practices, and integration with other educational programs and school reform initiatives; (9) Provide SLT with information about successful service-learning projects, programs, and initiatives for the purpose of project replication, adoption, and adaptation; (10) Ensure participation of program staff and partners (as appropriate) in all required trainings and meetings offered through SLT; and (11) Meet all evaluation and reporting requirements as specified in the RFA and/or by the program evaluator, SLT, Region 14 ESC, TEA, and CNCS.

Dates of Project. All services and activities related to this proposal will be conducted within specified dates. The starting date will be December 1, 2010, with an ending date of August 31, 2012. Successful applicants will receive funding for the remainder of the 2010-2011 school year and will submit an application for continuation funding in early 2011 for the 2011-2012 school year.

Project Amount. A range of grants will be awarded from $10,000 to $110,000 based on student ADA. SSAa are allowable to a maximum of $140,000. Approximately $200,000 is available for grant awards. Continuation funding will be based on satisfactory progress and on general budget approval by the Corporation for National and Community Service (CNCS), the Texas Education Agency, and Region 14 ESC. This project is funded 100% from CNCS federal funds. Applicants must provide matching funds for the grant at the rate of 1:1 in cash or in kind. Matching funds may come from any source, including federal funds, that does not specifically prohibit such use. Funds authorized by or through CNCS, however, may not be used as matching. Indirect costs may not be charged to this grant.

Selection Criteria. Subgrantees will be selected on the basis of total points awarded through a competitive grant review process in which applications receiving 70% or higher of the total points will be considered for funding. Additional factors will be considered prior to selection of the programs recommended for funding to ensure that programs meet the intent and purposes of the authorizing statute and guidance, are cost effective, are diverse with respect to size of districts and geographic location in Texas, and demonstrate greatest need, as reflected by the percentage of economically disadvantaged students in the district and the number of economically disadvantaged students who will actively participate in service-learning.

Region 14 ESC is not obligated to execute a resulting grant award, provide funds, or endorse any proposal submitted in response to this RFA. This RFA does not commit Region 14 ESC to pay any costs incurred before a NOGA is executed. The issuance of this RFA does not obligate Region 14 ESC to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of the RFA may be obtained by downloading the application from the SLT website at www.servicelearningtexas.org; by writing Service Learning Texas, 2499 S. Capital of Texas Highway, Suite A-107, Austin, Texas 78746-7703; or by calling (512) 420-0214.

Further Information. For clarifying information about the RFA, contact Service Learning Texas at (512) 420-0214. Opportunities for technical assistance will also be indicated in the RFA.

Deadline for Receipt of Proposals. Proposals must be received by mail or delivery service at Service Learning Texas by 5:00 p.m. (Central

Standard Time), Tuesday, October 26, 2010, to be considered. Facsimile and e-mail copies will not be accepted.

TRD-201005164
Ronnie Kincaid
Executive Director
Education Service Center, Region XIV
Filed: September 1, 2010

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 11, 2010.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512)239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 11, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Alcoa World Alumina, LLC; DOCKET NUMBER: 2010-0633-AIR-E; IDENTIFIER: RN100242577; LOCATION: Point Comfort, Calhoun County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §116.115(c) and §111.111(a)(1)(C) and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions and excess opacity; PENALTY: $20,700; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3420; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(2) COMPANY: Basell USA, Inc.; DOCKET NUMBER: 2010-0708-AIR-E; IDENTIFIER: RN100216761; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: polypropylene plant; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Number 9423, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent the unauthorized release of 726.4 pounds of volatile organic compounds (VOCs); PENALTY: $3,550; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Benedum Gas Partners, L.P. dba WTG Benedum Joint Venture; DOCKET NUMBER: 2010-0700-AIR-E; IDENTIFIER: RN100211846; LOCATION: Crane, Upton County; TYPE OF FACILITY: natural gas gathering pipeline network; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), Federal Operating Permit (FOP) Number O-00945/Oil and Gas General Operating Permit Number 514, Site-wide Requirements (b)(2), and THSC, §382.085(b), by failing to submit the annual permit compliance certification; PENALTY: $3,175; ENFORCEMENT COORDINATOR: Gena Hawkins, (512) 239-2583; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(4) COMPANY: City of Bynum; DOCKET NUMBER: 2010-0646-PWS-E; IDENTIFIER: RN101393429; LOCATION: Bynum, Hill County; TYPE OF FACILITY: public water supply PWS); RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the consumer confidence report (CCR) to each bill paying customer and by failing to submit to the TCEQ a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $232; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3672; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Chai Express, Inc.; DOCKET NUMBER: 2010-1127-PST-E; IDENTIFIER: RN102073319; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(3)(K) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS) in proper operating condition; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $3,118; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5890; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Chemtrade Refinery Services, Inc.; DOCKET NUMBER: 2010-0052-AIR-E; IDENTIFIER: RN100218932; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: sulfuric acid plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air Permit Number 3149, SC Number 1, FOP Number O-01409, SC Number 10, and THSC, §382.085(b), by failing to adhere to the permitted maximum allowable emission limit for ammonia nitrogen; PENALTY: $8,850; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: Chevron Phillips Chemical Company, LP; DOCKET NUMBER: 2010-0607-AIR-E; IDENTIFIER: RN103919817; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), NSR Permit Number 1504A/PSD-TX-748, SC Number 1, and THSC, §382.085(b), by failing to comply with the permitted emissions limits for VOC, ammonia nitrogen, and carbon monoxide from a flare; and 30 TAC §101.20(3) and §116.115(c), NSR Permit Number 1504A/PSD-TX-748, SC Number 16, and THSC, §382.085(b), by failing to properly maintain continuous emissions monitoring systems to measure and record emissions; PENALTY: $562,350; Supplemental Environmental Project (SEP) offset amount of $224,940 applied to Houston Regional Monitoring Corporation - *HRMC Houston Area Air Monitoring;* ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Chilton Water Supply and Sewer Service Corporation; DOCKET NUMBER: 2009-1910-MWD-E; IDENTIFIER: RN102285814; LOCATION: Chilton, Falls County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010811001, Permit Conditions Number 2.d., and the Code, §26.121(a)(1), by failing to prevent the discharge and accumulation of sludge in the receiving stream; 30 TAC §305.125(1) and §319.7 and TPDES Permit Number WQ0010811001, Operational Requirements Number 2, by failing to implement the requirements of the solids management plan; 30 TAC §305.125(1) and (5) and TPDES Permit Number WQ0010811001, Operational Requirements Number 1, by failing to ensure that all systems of collection, treatment, and disposal are properly operated and maintained; 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0010811001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1), TPDES Permit Number WQ0010811001, Effluent Limitations and Monitoring Requirements Number 2, and the Code, §26.121(a), by failing to maintain a chlorine residual between one and four milligrams per liter; PENALTY: $24,184; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5890; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: CLAUSSEN'S CREST (SAN ANTONIO) HOMEOWNERS' ASSOCIATION, INC. dba Iron Mountain Ranch Homeowners' Association; DOCKET NUMBER: 2010-0271-EAQ-E; IDENTIFIER: RN105840201; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a water pollution abatement plan; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(10) COMPANY: Cowtown RV Park, Limited; DOCKET NUMBER: 2010-1022-MWD-E; IDENTIFIER: RN101222792; LOCATION: Parker County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014003001, Effluent Limitations and Monitoring Requirements Number 2, and the Code, §26.121(a), by failing to comply with permit effluent limits for total residual chlorine; and 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0014003001, Sludge Provisions, by failing to submit a complete sludge report for the monitoring period ending July 31, 2009; PENALTY: $2,146; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: DALLAS SNR, INC. dba Valero Food Mart 6; DOCKET NUMBER: 2010-0961-PST-E; IDENTIFIER: RN102965068; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; 30 TAC §115.245(1) and THSC, §382.085(b), by failing to successfully complete the Stage II VRS test to ensure that the system meets the performance criteria for the system within 30 days of major system replacement or modification; and 30 TAC §115.242(5) and THSC, §382.085(b), by failing to remove all dispensing equipment for which vapor recovery has been impaired; PENALTY: $3,803; ENFORCEMENT COORDINATOR: Theresa Hagood, (512) 239-2540; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2010-0591-AIR-E; IDENTIFIER: RN100210319; LOCATION: La Porte, Harris County; TYPE OF FACILITY: polymer manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 4477, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(13) COMPANY: ISP Synthetic Elastomers, LLC; DOCKET NUMBER: 2010-0916-AIR-E; IDENTIFIER: RN100224799; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: synthetic elastomer manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01224, General Terms and Conditions and Special Terms and Conditions Number 11, NSR Permit Number 9908, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $6,325; SEP offset amount of $2,530 applied to Southeast Texas Regional Planning Commission - Southeast Texas Regional Air Monitoring Network Ambient Air Monitoring Station; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: ISSN ENTERPRISES, INC. dba Nick's Grocery; DOCKET NUMBER: 2010-0601-PST-E; IDENTIFIER: RN101876183; LOCATION: Pearland, Brazoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS and each current employee receives in-house Stage II vapor recovery training regarding the purpose and operation of the VRS; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §115.244(1) and THSC, §382.085(b), by failing to conduct daily inspections of the Stage II VRS; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to inspect and test the cathodic protection system for operability and adequacy of protection; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; 30 TAC §334.10(b) and §334.51(c)(2), by failing to maintain UST records and make them immediately available for inspection; and 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the UST system; PENALTY: $23,787; ENFORCEMENT COORDINATOR: Judy

Kluge, (817) 588-5825; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Jewish Community Center of Houston, Texas; DOCKET NUMBER: 2010-0807-PWS-E; IDENTIFIER: RN101245512; LOCATION: Fort Bend County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, 341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notice of the failure to sample; PENALTY: $2,800; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Jose E. Alvarez dba Klassic Paint & Body Shop; DOCKET NUMBER: 2010-0573-AIR-E; IDENTIFIER: RN105796247; LOCATION: Laredo, Webb County; TYPE OF FACILITY: auto body refinishing shop; RULE VIOLATED: 30 TAC §106.436(11)(A) and THSC, §382.085(b), by failing to maintain a stack height of at least 1.2 times the height of the tallest building within 200 feet; 30 TAC §106.436(13) and THSC, §382.085(b), by failing to keep the paint booth exhaust stack free of a rain cap; and 30 TAC §106.436(16) and THSC, §382.085(b), by failing to maintain and provide upon request, material safety data sheets, particulate removal efficiency of booth filters, and monthly coating and solvent usage/purchase records; PENALTY: $1,575; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(17) COMPANY: LDH ENERGY MONT BELVIEU, L.P.; DOCKET NUMBER: 2010-0844-IWD-E; IDENTIFIER: RN105231831; LOCATION: Harris County; TYPE OF FACILITY: pipeline transportation terminal with wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0004876000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with the permitted effluent limitations for total suspended solids; PENALTY: $2,500; ENFORCEMENT COORDINATOR: J.R. Cao, (512) 239-2543; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: Luminant Generation Company, LLC; DOCKET NUMBER: 2010-0890-AIR-E; IDENTIFIER: RN101559854; LOCATION: Coppell, Dallas County; TYPE OF FACILITY: electricity generation plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $2,025; ENFORCEMENT COORDINATOR: Heather Podliphy, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: David McKee; DOCKET NUMBER: 2010-0694-WR-E; IDENTIFIER: RN105897797; LOCATION: Cleburne, Johnson County; TYPE OF FACILITY: reservoir; RULE VIOLATED: 30 TAC §297.31 and the Code, §11.143, by failing to obtain a water rights permit prior to diverting water of the state from a reservoir; PENALTY: $13,115; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: Thuan T. Ngo; DOCKET NUMBER: 2010-0802-PST-E; IDENTIFIER: RN102244258; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: USTs; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, an existing UST system; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; PENALTY: $6,500; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5890; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(21) COMPANY: Ranglers Group, Inc. dba Ranglers; DOCKET NUMBER: 2010-0582-PST-E; IDENTIFIER: RN101550275; LOCATION: Stephenville, Erath County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system; 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST; 30 TAC §334.49(a)(4) and the Code, §26.3475(d), by failing to provide corrosion protection to all underground metal components of a UST system; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the UST; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detector at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month; and 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; PENALTY: $9,179; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: SAHIL MANAGEMENT, LIMITED dba Shady Acres Trailer Park; DOCKET NUMBER: 2010-0572-PWS-E; IDENTIFIER: RN101458990; LOCATION: near Justiceburg, Bexar County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the CCR to each bill paying customer by July 1 of each year and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information on the CCR is correct and consistent with compliance monitoring data; PENALTY: $580; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3672; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(23) COMPANY: Samir H. Bhatt dba Seven Days Drive In; DOCKET NUMBER: 2010-0810-PST-E; IDENTIFIER: RN102250263; LOCATION: Terrell, Kaufman County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b) and the Code, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; and 30 TAC §334.48(a) and the Code, §26.121, by failing to ensure the UST system was operated, maintained, and managed in a manner to prevent a release of regulated substances; PENALTY: $10,854; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: SOUTHERN TRI-STAR MARKETS II, LIMITED dba Texaco Food Mart 2901; DOCKET NUMBER: 2010-0740-PST-E; IDENTIFIER: RN102893799; LOCATION: Angleton, Brazoria County; TYPE OF FACILITY: convenience store with retail sales

of gasoline; RULE VIOLATED: 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS and each current employee receives in-house Stage II vapor recovery training regarding the purpose and correct operation of the Stage II equipment; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment, vapor space manifolding, and dynamic back pressure; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; and 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition and free of defects; PENALTY: $11,141; ENFORCEMENT COORDINATOR: Tate Barrett, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(25) COMPANY: SOUTHERN TRI-STAR MARKETS, LIMITED dba Texaco Food Mart; DOCKET NUMBER: 2010-0747-PST-E; IDENTIFIER: RN102394970; LOCATION: Lake Jackson, Brazoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(4) and THSC, §382.085(b), by failing to maintain Stage II records at the station; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment, vapor space manifolding, and dynamic back pressure; 30 TAC §115.242(9) and THSC,§382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump; and 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; PENALTY: $11,516; ENFORCEMENT COORDINATOR: Tate Barrett, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(26) COMPANY: Stiff Creek Mobile Home Park, L.P.; DOCKET NUMBER: 2010-0796-PWS-E; IDENTIFIER: RN101212546; LOCATION: Collin County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.71(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the CCR to each bill paying customer by July 1 of each year and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $425; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3672; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: Kenneth Ing dba The Whitesboro Truck Stop; DOCKET NUMBER: 2009-0697-AIR-E; IDENTIFIER: RN105061006; LOCATION: Whitesboro, Grayson County; TYPE OF FACILITY: truck stop; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to prevent dust emissions from causing or contributing to nuisance conditions on surrounding properties; PENALTY: $800; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: TJSR, INC. dba Sunny Food Mart; DOCKET NUMBER: 2010-0670-PST-E; IDENTIFIER: RN101786259; LOCATION: Missouri City, Fort Bend County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to provide proper corrosion protection for the UST system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the UST system for releases; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the UST identification number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; and 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the UST system; PENALTY: $8,506; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(29) COMPANY: US Ecology Texas, Inc.; DOCKET NUMBER: 2009-1717-IHW-E; IDENTIFIER: RN101445666; LOCATION: Robstown, Nueces County; TYPE OF FACILITY: hazardous waste processing, storage, and disposal; RULE VIOLATED: 30 TAC §335.2 and §335.24 and 40 Code of Federal Regulations §279.11, by failing to verify that used oil was excluded from the requirement to obtain a permit for storage, processing, and disposal of hazardous waste; and 30 TAC §335.6(b), by failing to provide notification of a change in recycling practice regarding the purpose a material serves in the recycling activity; PENALTY: $54,600; SEP offset amount of $21,840 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(30) COMPANY: City of Wolfe City; DOCKET NUMBER: 2009-1387-MWD-E; IDENTIFIER: RN102896255; LOCATION: Wolfe City, Hunt County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010383001, Permit Conditions 2.g, and the Code, §26.121, by failing to prevent the unauthorized discharge of wastewater; and 30 TAC §305.125(1) and §319.7(c) and TPDES Permit Number WQ0010383001, Monitoring and Reporting Requirements Number 1, by failing to submit complete and accurate discharge monitoring reports; PENALTY: $7,990; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201005110
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 31, 2010

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Enforcement Orders

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2006-0561-AIR-E on August 26, 2010 assessing $493,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jeffrey Huhn, Staff Attorney at (210) 403-4023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chuen F. Cheung dba A-Sunnys & Mingwen Hsu dba A-Sunnys, Docket No. 2007-0649-PST-E on August 26, 2010 assessing $7,620 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J. W. McQuerry dba McQuerry Properties, Docket No. 2007-0715-MSW-E on August 26, 2010 assessing $10,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Treadwell, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joe Ben Wolf, Docket No. 2008-0398-PST-E on August 26, 2010 assessing $6,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Humble Partners Limited Partnership, Docket No. 2008-1050-MWD-E on August 26, 2010 assessing $3,529 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Neelam Markets, Inc. dba Fuel Express, Docket No. 2008-1502-PST-E on August 26, 2010 assessing $121,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sonador Dairy, L.L.C., Docket No. 2008-1630-AGR-E on August 26, 2010 assessing $5,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Petroleum Wholesale, L.P. dba Sunmart 438, Docket No. 2008-1674-PST-E on August 26, 2010 assessing $34,807 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tynan Water Supply Corporation, Docket No. 2009-0018-MWD-E on August 26, 2010 assessing $26,215 in administrative penalties with $26,215 deferred.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bryan Iron & Metal, Ltd., Docket No. 2009-0107-MLM-E on August 26, 2010 assessing $8,662 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United States Department of the Air Force, Docket No. 2009-0109-PWS-E on August 26, 2010 assessing $990 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2009-0388-AIR-E on August 26, 2010 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Paul Sims dba Rosebowl Regency Inn, Docket No. 2009-0472-PWS-E on August 26, 2010 assessing $577 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rohm and Haas Texas Incorporated, Docket No. 2009-1116-AIR-E on August 26, 2010 assessing $542,251 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Arash the Archer Corporation dba Corner Food Store, Docket No. 2009-1350-PST-E on August 26, 2010 assessing $3,663 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip Goodwin, P.G., Staff Attorney at (512) 239-0675, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mitsubishi Caterpillar Forklift America Inc., Docket No. 2009-1460-AIR-E on August 26, 2010 assessing $105,590 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Vintage Living LLC, Docket No. 2009-1700-WQ-E on August 26, 2010 assessing $1,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Fishburn, Staff Attorney at (512) 239-0635, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Orange County Water Control and Improvement District No. 2, Docket No. 2009-1727-MWD-E on August 26, 2010 assessing $14,550 in administrative penalties with $2,910 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Syed Nasru Enterprises, Inc. dba Shop N Go, Docket No. 2009-1751-PST-E on August 26, 2010 assessing $6,706 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bell County Water Control and Improvement District No. 2, Docket No. 2009-1763-MWD-E on August 26, 2010 assessing $74,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Staff Water Supply Corporation, Docket No. 2009-1787-PWS-E on August 26, 2010 assessing $374 in administrative penalties with $74 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Centex Materials LLC, Docket No. 2009-1940-IWD-E on August 26, 2010 assessing $2,340 in administrative penalties with $468 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Dallas, Docket No. 2009-1941-MWD-E on August 26, 2010 assessing $9,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Criminal Justice, Docket No. 2009-2041-PWS-E on August 26, 2010 assessing $3,675 in administrative penalties with $735 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Florence, Docket No. 2009-2048-MWD-E on August 26, 2010 assessing $5,970 in administrative penalties with $1,194 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Millennium Petrochemicals Inc., Docket No. 2009-2068-AIR-E on August 26, 2010 assessing $6,650 in administrative penalties with $1,330 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Gustine, Docket No. 2009-2080-PWS-E on August 26, 2010 assessing $2,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2010-0007-AIR-E on August 26, 2010 assessing $50,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, P.G., Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Stolthaven Houston, Inc., Docket No. 2010-0031-IHW-E on August 26, 2010 assessing $36,530 in administrative penalties with $7,306 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eagle Rock Field Services, L.P., Docket No. 2010-0041-AIR-E on August 26, 2010 assessing $2,650 in administrative penalties with $530 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Intercontinental Terminals Company LLC, Docket No. 2010-0065-AIR-E on August 26, 2010 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Center, Docket No. 2010-0104-PWS-E on August 26, 2010 assessing $10,075 in administrative penalties with $2,015 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J F A Oil Company dba Regency Car Wash, Docket No. 2010-0138-PST-E on August 26, 2010 assessing $5,500 in administrative penalties with $1,100 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Raymon Harrell and Audrey Grisham, Docket No. 2010-0148-PST-E on August 26, 2010 assessing $2,750 in administrative penalties with $550 deferred.

Information concerning any aspect of this order may be obtained by contacting Amanda Henry, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Quick Fuel Fleet Services, LLC dba Quick Fuel, Docket No. 2010-0150-PST-E on August 26, 2010 assessing $18,238 in administrative penalties with $3,647 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LBC Houston, L.P., Docket No. 2010-0196-AIR-E on August 26, 2010 assessing $4,425 in administrative penalties with $885 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Podlipny, Enforcement Coordinator at (512) 239-2603, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Akzo Nobel Chemicals, Inc. and Akzo Nobel Polymer Chemicals LLC, Docket No. 2010-0210-IWD-E on August 26, 2010 assessing $33,875 in administrative penalties with $6,775 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip Hampsten, Staff Attorney at (512) 239-6732, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Paul Sims dba Rosebowl Regency Inn, Docket No. 2010-0212-PWS-E on August 26, 2010 assessing $607 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nueces County Water Control and Improvement District No. 5, Docket No. 2010-0226-MLM-E on August 26, 2010 assessing $15,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2010-0257-AIR-E on August 26, 2010 assessing $9,905 in administrative penalties with $1,981 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Benoit, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Probh Corporation dba Elk Food Mart, Docket No. 2010-0278-PST-E on August 26, 2010 assessing $10,687 in administrative penalties with $2,137 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2010-0284-AIR-E on August 26, 2010 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Petrogas, LLC dba Fallbrook Food Store, Docket No. 2010-0305-PST-E on August 26, 2010 assessing $5,848 in administrative penalties with $1,169 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flint Hills Resources, LP, Docket No. 2010-0309-AIR-E on August 26, 2010 assessing $29,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding National Oilwell Varco, L.P. dba NOV Tuboscope, Docket No. 2010-0324-MSW-E on August 26, 2010 assessing $25,839 in administrative penalties with $5,167 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding H & B Marketing Services, Inc. dba Alvin Shell & Blimpies, Docket No. 2010-0330-PST-E on August 26, 2010 assessing $9,008 in administrative penalties with $1,801 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ash Grove Texas, L.P., Docket No. 2010-0332-IWD-E on August 26, 2010 assessing $2,750 in administrative penalties with $550 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Norit Americas, Inc., Docket No. 2010-0345-AIR-E on August 26, 2010 assessing $15,251 in administrative penalties with $3,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joe Marsden, Docket No. 2010-0355-EAQ-E on August 26, 2010 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting J. R. Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Circle K Stores Inc, Docket No. 2010-0369-PST-E on August 26, 2010 assessing $3,726 in administrative penalties with $745 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512)

239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District 154, Docket No. 2010-0374-PWS-E on August 26, 2010 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lone Oak Feeders, Inc., Docket No. 2010-0408-AGR-E on August 26, 2010 assessing $1,630 in administrative penalties with $326 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Baylor University, Docket No. 2010-0409-PST-E on August 26, 2010 assessing $3,875 in administrative penalties with $775 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MFS Corporation dba Hewitt Shell, Docket No. 2010-0412-PST-E on August 26, 2010 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding B. T. Rand Oil Company dba Texaco Food Mart, Docket No. 2010-0416-PST-E on August 26, 2010 assessing $6,520 in administrative penalties with $1,304 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MarkWest Pinnacle, L.L.C., Docket No. 2010-0429-AIR-E on August 26, 2010 assessing $3,182 in administrative penalties with $636 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding REN Services, Inc., Docket No. 2010-0444-MLM-E on August 26, 2010 assessing $2,289 in administrative penalties with $457 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, P.G., Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tien Shan, Inc. dba Dairy Ashford Mobil, Docket No. 2010-0450-PST-E on August 26, 2010 assessing $1,070 in administrative penalties with $214 deferred.

Information concerning any aspect of this order may be obtained by contacting Tate Barrett, Enforcement Coordinator at (713) 422-8968, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding M & S Business Corporation dba M & S Food Mart, Docket No. 2010-0461-PST-E on August 26, 2010 assessing $5,951 in administrative penalties with $1,190 deferred.

Information concerning any aspect of this order may be obtained by contacting Philip Aldridge, Enforcement Coordinator at (512) 239-0855, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding V.C. Whitworth, Docket No. 2010-0470-MLM-E on August 26, 2010 assessing $1,292 in administrative penalties with $258 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, P.E., Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Carmax Auto Superstores, Inc. dba Carmax 7111, Docket No. 2010-0472-PST-E on August 26, 2010 assessing $4,523 in administrative penalties with $904 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Park, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Lipan, Docket No. 2010-0476-MWD-E on August 26, 2010 assessing $2,067 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting J. R. Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aztex Dairy, Inc., Docket No. 2010-0486-AGR-E on August 26, 2010 assessing $2,075 in administrative penalties with $415 deferred.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hoover Construction Company, Inc., Docket No. 2010-0501-WQ-E on August 26, 2010 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Don A. Stewart, Inc., Docket No. 2010-0510-PST-E on August 26, 2010 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Park, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trend Gathering & Treating, LP, Docket No. 2010-0543-AIR-E on August 26, 2010 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator at (409) 899-

8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pineland, Docket No. 2010-0551-MWD-E on August 26, 2010 assessing $4,970 in administrative penalties with $994 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Parkside at Mayfield Ranch, Ltd., Docket No. 2010-0571-EAQ-E on August 26, 2010 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting J. R. Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Bruceville-Eddy, Docket No. 2010-0600-PWS-E on August 26, 2010 assessing $282 in administrative penalties with $56 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding V&M Star, a Partnership with General and Limited Partners, LP, Docket No. 2010-0655-IWD-E on August 26, 2010 assessing $6,080 in administrative penalties with $1,216 deferred.

Information concerning any aspect of this order may be obtained by contacting Jordan Jones, Enforcement Coordinator at (512) 239-2569, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Grant H. Gilson, Docket No. 2010-0928-LII-E on August 26, 2010 assessing $175 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding David E. Thomas, Docket No. 2010-0927-OSI-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Nazma, L.L.C., Docket No. 2010-0838-PST-E on August 26, 2010 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Richard R. Roelke, Docket No. 2010-1050-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Juan Garza, Docket No. 2010-0829-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Kenny Childers, Docket No. 2010-0964-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Johnny D. Braddock, Docket No. 2010-1060-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Joshua A. Isham, Docket No. 2010-1052-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Mark E. Armstrong, Docket No. 2010-0789-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Daniel W. Bickham, Docket No. 2010-0874-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Jerry Ray Cansler, Docket No. 2010-1051-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Jimmy W. Allen, Docket No. 2010-1031-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding LaVern Williamson, Docket No. 2010-1030-WOC-E on August 26, 2010 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Miles Construction Company, Inc., Docket No. 2010-1001-WQ-E on August 26, 2010 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Boone & Boone Construction, Ltd., Docket No. 2010-1002-WQ-E on August 26, 2010 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201005162
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 1, 2010

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Notice of a Public Hearing on a Proposed Revision to 30 TAC Chapter 291

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding the proposed repeal of 30 TAC Chapter 291, Utility Regulations, §291.126.

This section provides that a tenant's water utility service may be disconnected if payment was not received by the due date, and the owner issues a disconnection notice after the due date at least ten days prior to a stated date of disconnection.

The commission will hold a public hearing on this proposal in Austin on October 5, 2010 at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-030-291-OW. The comment period closes October 11, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Doug Holcomb, Water Supply Division at (512) 239-6947.

TRD-201005069
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 27, 2010

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 11, 2010**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 11, 2010**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Ali Ahmad Alhindi dba Oil Depot; DOCKET NUMBER: 2009-2086-PST-E; TCEQ ID NUMBER: RN100535004; LOCATION: 6464 East Northwest Highway, Dallas, Dallas County; TYPE OF FACILITY: two used oil underground storage tanks (USTs) and an automobile maintenance and repair shop; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system which contains regulated substances; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Financial Account Number 0058768U for Fiscal Years 2002 - 2007; PENALTY: $5,665; STAFF

ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: City of Bynum; DOCKET NUMBER: 2009-1406-MWD-E; TCEQ ID NUMBER: RN101612943; LOCATION: approximately 700 feet northeast of the intersection of State Highway 171 and Farm-to-Market Road 1242, Bynum, Hill County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and (5) and Texas Discharge Elimination System Permit Number WQ0011542001, Operational Requirements Number 4, by failing to install and subsequently maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures by means of alternate power sources, standby generators, and/or retention of inadequately treated wastes; PENALTY: $3,575; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: FT-EZCO, Inc.; DOCKET NUMBER: 2010-0438-PST-E; TCEQ ID NUMBER: RN101551828; LOCATION: 311 East Northside Drive, Fort Worth, Tarrant County; TYPE OF FACILITY: two USTs and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.242(3)(I) and (K) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board (CARB) Executive Order and free of defects that would impair the effectiveness of the system; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months and vapor space manifolding and dynamic back-pressure at least once every 36 months or upon major system replacement or modification, whichever occurs first; PENALTY: $4,484; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: J N J Operations, Inc. dba Alvin Express; DOCKET NUMBER: 2010-0235-PST-E; TCEQ ID NUMBER: RN104793054; LOCATION: 680 Highway 35 Bypass North, Alvin, Brazoria County; TYPE OF FACILITY: two USTs and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the annual renewal date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §115.246(1), (3) - (6) and (7)(A) and THSC, §382.085(b), by failing to maintain Stage II records at the station; and 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable CARB Executive Order, and free of defects that would impair the effectiveness of the system; PENALTY: $3,035; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201005140
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 31, 2010

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 11, 2010.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 11, 2010.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Davis and Wardlaw Oil Company, Inc.; DOCKET NUMBER: 2010-0634-PST-E; TCEQ ID NUMBER: RN100523810; LOCATION: 301 East McLain Street, Seymour, Baylor County; TYPE OF FACILITY: two underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days from the date of occurrence of the change or addition; PENALTY: $6,300; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(2) COMPANY: Dwayne Gray dba Personal Touch Detailing Service; DOCKET NUMBER: 2010-0407-PST-E; TCEQ ID NUMBER: RN101663052; LOCATION: 2012 West Waco Drive, Waco, McLennan County; TYPE OF FACILITY: three USTs; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; 30 TAC §334.10(b)(1)(B),

by failing to maintain all UST records and make them immediately available for inspection upon the request of agency personnel; 30 TAC §334.49(a)(2) and §334.54(c)(1), by failing to provide adequate corrosion protection to a UST system; PENALTY: $4,725; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Ganiu Bello; DOCKET NUMBER: 2010-0538-PST-E; TCEQ ID NUMBER: RN100801232; LOCATION: 2501 Miller Avenue, Fort Worth, Tarrant County; TYPE OF FACILITY: property and three out-of-service USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $2,625; STAFF ATTORNEY: Sharesa Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: George W. Jackson dba Fort Jackson Mobile Estates; DOCKET NUMBER: 2010-0531-PWS-E; TCEQ ID NUMBER: RN102698545; LOCATION: 116th Street and South University, Lubbock, Lubbock County; TYPE OF FACILITY: mobile home park with a public water supply; RULES VIOLATED: 30 TAC §290.106(e), (f)(3), and §290.122(b), Texas Health and Safety (THSC), §341.0315(c), and TCEQ DO, Docket Number 2006-0290-PWS-E, Ordering Provision Number 2.b., by failing to comply with the maximum contaminant level (MCL) of 4.0 milligrams per liter (mg/L) for fluoride, based on a running annual average, failing to provide public notification and certify the delivery of a public notice for the failure to comply with the MCL for fluoride during the third and fourth quarter of 2009, and failing to report all inorganic chemical results to the executive director for the third quarter and fourth quarter of 2009; 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; and 30 TAC §290.51(a)(3), TWC, §5.702, and TCEQ DO, Docket Number 2006-0290-PWS-E, Ordering Provision Number 2.a., by failing to pay public health service fees, including late fees, for TCEQ Financial Administration Account Number 91520064; PENALTY: $2,701; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(5) COMPANY: Jarrod L. Meyer; DOCKET NUMBER: 2010-0705-LII-E; TCEQ ID NUMBER: RN104846183; LOCATION: 5902 Stoneleigh Drive, Tyler, Smith County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2), TWC, §37.003, and TCEQ Agreed Order (AO) Docket Number 2008-1155-LII-E, Ordering Provision Number 2, by failing to refrain from advertising or representing himself to the public as a person who can perform service for which a license or registration is required; PENALTY: $362; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(6) COMPANY: Lisa Glenn dba Grow Baby Grow; DOCKET NUMBER: 2010-0482-LII-E; TCEQ ID NUMBER: RN105886360; LOCATION: 499 Hidden Lake Drive, Powderly, Lamar County; TYPE OF FACILITY: landscape irrigation; RULES VIOLATED: 30 TAC §30.5(b), TWC, §37.003, Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing or servicing an irrigation system and to refrain from advertising or representing herself to the public as a person who can perform services for which a license or registration is required; PENALTY: $745; STAFF ATTORNEY: Sharesa Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: Ricardo Flores; DOCKET NUMBER: 2009-1491-PST-E; TCEQ ID NUMBER: RN101797827; LOCATION: 301 Gulfway Drive, Port Arthur, Jefferson County; TYPE OF FACILITY: three inactive USTs and property; RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(b)(2) and (d)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements, failing to maintain all piping, pumps, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons, and failing to ensure that any residue from stored regulated substances which remained in the temporarily out-of-service UST system did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Financial Account Number 0056022U for Fiscal Years 1997 - 2007; PENALTY: $6,300; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(8) COMPANY: Salvador Farias III; DOCKET NUMBER: 2010-0026-EAQ-E; TCEQ ID NUMBER: RN105817241; LOCATION: 13105 Babcock Road, San Antonio, Bexar County; TYPE OF FACILITY: three acre construction site; RULES VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain an Edwards Aquifer Water Pollution Abatement Plan prior to commencing a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $13,260; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(9) COMPANY: Shawn Horvath dba Aero Valley Water Service; DOCKET NUMBER: 2010-0619-PWS-E; TCEQ ID NUMBER: RN101198331; LOCATION: east of Interstate 35 West on Farm-to-Market Road 1171, 1/2 mile south on Cleveland Gibbs Road at Northwest Regional Airport, Denton County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.45(b)(1)(B)(ii) and THSC, §341.0315(c), by failing to provide a total storage capacity of at least 200 gallons per connection; 30 TAC §290.45(b)(1)(B)(iv) and THSC, §341.0315(c), by failing to provide a pressure tank capacity of at least 20 gallons per connection; 30 TAC §290.43(e), by failing to provide an intruder-resistant fence to protect the facility's ground storage and pressure tanks; 30 TAC §290.46(d)(2)(A), by failing to maintain a residual disinfectant concentration of at least 0.2 mg/L free chlorine throughout the distribution system at all times; 30 TAC §290.46(e)(4)(A) and THSC, §341.034(b), by failing to ensure that the facility is at all times operated under the direct supervision of a water works operator that holds a valid class "D" or higher license; 30 TAC §290.46(f)(2) and (3)(E)(i), by failing to keep on file and make available for review an up-to-date record of water works operations and maintenance activities for operator review and reference; 30 TAC §290.41(c)(3)(N), by failing to provide

a flow measuring device for the facility's well; 30 TAC §290.41(l), by failing to compile and maintain a thorough plant operations manual for operator review and reference; 30 TAC §290.44(d)(4), by failing to provide accurate metering devices at each residential, commercial, or industrial service connection; 30 TAC §290.46(n)(3), by failing to maintain copies of the well completion data such as well material setting data, geological data, sealing information, disinfection information, microbiological sampling results, and a chemical analysis report of a representative sample of water from the well on file at the facility and to make the data available to the executive director upon request; 30 TAC §290.46(t), by failing to post a legible sign at the water treatment facility that provides the name of the water supply and an emergency telephone number where a responsible official can be contacted; and 30 TAC §290.51(a)(6), by failing to pay all annual and late Public Health Service fees for TCEQ Financial Administration Account Number 90610243 for Fiscal Years 2003 - 2010 to the TCEQ in a timely manner; PENALTY: $4,676; STAFF ATTORNEY: Xavier Guerra, Litigation Division, R-13, (210) 403-4016; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Trudy Gillem dba Country Villa Mobile Home Park; DOCKET NUMBER: 2010-0447-PWS-E; TCEQ ID NUMBER: RN101441764; LOCATION: North side of Highway 202 approximately 3 miles east of Beeville, Bee County; TYPE OF FACILITY: mobile home park with a public water supply system; RULES VIOLATED: 30 TAC §290.42(j), by failing to use an approved chemical or media for the disinfection of potable water that conforms to the American National Standards Institute/National Sanitation Foundation standards; 30 TAC §290.46(s)(1), by failing to calibrate the well meter once every three years; 30 TAC §290.44(d)(6), by failing to provide all dead-end mains with acceptable flush valves; 30 TAC §290.46(t), by failing to post a legible sign at the facility's production, treatment, and storage facilities that contains the name of the facility and emergency telephone numbers where a responsible official can be contacted; 30 TAC §290.41(c)(3)(O), by failing to enclose the well with an intruder-resistant fence or lockable ventilated well house; TWC, §5.702, 30 TAC §290.51(a)(3), and TCEQ AO, Docket Number 2005-0201-PWS-E, Ordering Provision 2.a.iii., by failing to pay public health service fees, including late fees, for TCEQ Financial Administration Account Number 90130058 for Fiscal Years 1998 - 2009; THSC, §341.0315(c), 30 TAC §290.45(b)(1)(F)(iii), and TCEQ AO Docket Number 2005-0201-PWS-E, Ordering Provision Number 2.c.ii., by failing to provide two or more service pumps with a total rated capacity of 2.0 gallons per minute per connection; THSC, §341.033(a) and 30 TAC §290.46(e), by failing to ensure that the production, distribution, and treatment facilities are operated at all times under the direct supervision of a water works operator who holds an applicable, valid license issued by the commission; 30 TAC §290.121(a) and (b), by failing to make available for commission review a complete, up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water system will use to comply with the monitoring requirements; 30 TAC §290.46(s)(2)(C)(i), by failing to verify the accuracy of manual disinfectant residual analyzers at least once every 30 days using chlorine solutions of known concentrations; 30 TAC §290.46(n)(2), by failing to maintain an up-to-date map of the distribution system so that valves and mains may be easily located during emergencies; 30 TAC §290.46(v), by failing to ensure that all electrical wiring at the facility is securely installed in compliance with a local or national electrical code; 30 TAC §290.110(e)(4)(A), by failing to submit a Disinfectant Level Quarterly Operating Report to the commission each quarter by the tenth day of the month following the end of each quarter; and 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the CCR to each bill paying customer by July 1 of each year and by failing to submit to the TCEQ by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $6,488; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

TRD-201005141
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 31, 2010

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Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit (Proposed) Permit No. 2369

APPLICATION City of Levelland, P.O. Box 1010, Levelland, Hockley County, Texas 79336, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new Type I and Type IV Arid Exempt Landfill permit. The facility is located approximately 5 miles south of the City of Levelland on Bobwhite Road, 2.5 miles east of U.S. Highway 385, 0.5 miles south of FM 1585, Hockley County, Texas 79336. The TCEQ received the application on July 8, 2010. The permit application is available for viewing and copying at the City of Levelland, City Hall, P.O. Box 1010, Levelland, Hockley County, Texas 79336.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number;

the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from City of Levelland at the address stated above or by calling Mr. Rick Osburn, City Manager, City of Levelland at (806) 984-0113. Issued: August 19, 2010

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201005161
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 1, 2010

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Notice of Water Quality Applications

The following notices were issued on August 20, 2010 through August 27, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

GREENSMITHS INC which operates a former graphite mine and processing plant, has applied for a renewal of TCEQ Permit No. WQ0000350000 which authorizes the discharge of storm water runoff, noncontact cooling water, and leachate from the tailings pile at a daily average flow not to exceed 300,000 gallons per day via Outfall 001; and the disposal of storm water runoff, noncontact cooling water, and leachate from the tailings pile by irrigation of a 23.8 acres irrigation tract of the tailings pile at an application rate not to exceed 50 inches per calendar year. The application also included a request for a minor amendment to remove the authorization to discharge via Outfall 001, reduce the irrigation tract from 23.8 acres to 16.5 acres, modify the application rate from 50 inches per calendar year to 25,000 gallons per day (equates to 20.4 inches/year), and update the authorized wastestream description to treated acid mine drainage and storm water. The proposed permit authorizes the disposal of treated acid mine drainage and storm water by irrigation of the 16.5 acre phytoplot/phytocap irrigation tract at a daily average flow of effluent not to exceed 25,000 gallons per day. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located at 2046 CR 115, approximately 2.1 miles north of the State Highway 29 crossing over Clear Creek which is approximately 10 miles west of the City of Burnet, Burnet County, Texas 75006.

AIR PRODUCTS LLC which operates the Battleground Road Facility, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment without renewal to TPDES Permit No. WQ0002177000, to reduce the monitoring frequency for pH from once per day (seven days per week) to once per day (Monday through Friday). The current permit authorizes the discharge of process wastewater, utility wastewater, hydrostatic test water, and storm water at a daily average flow not to exceed 12,000 gallons per day via Outfall 001. The facility is located on the east side of Battleground Road, approximately 1.75 miles north of the intersection of Battleground Road and State Highway 225 in the City of La Porte, Harris County, Texas 77571.

CITY OF NOCONA has applied for a renewal of TPDES Permit No. WQ0010355003, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 224,000 gallons per day. The facility is located 0.3 mile east of State Highway 175 (Montague Street); approximately 0.7 mile south of the intersection of U.S. Highway 82 and State Highway 175 in the City of Nocona in Montague County, Texas 76255.

CITY OF LOS FRESNOS has applied for a renewal of TPDES Permit No. WQ0010590002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,000,000 gallons per day. The facility is located at 802 South Nogal Street, approximately 2,000 feet west of Farm-to-Market Road 1847 and 3,000 feet south of State Highway 100 at the end of Nogal Street in the southwestern portion of the City of Los Fresnos in Cameron County, Texas 78566.

CITY OF MONTGOMERY has applied for a major amendment to TPDES Permit No. WQ0011521001 to authorize the permittee to re-rate the existing plant to discharge treated domestic wastewater at a daily average flow not to exceed 175,000 gallons per day and reduce the effluent limitation. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located north of the City of

Montgomery, approximately 4,000 feet north of the intersection of Farm-to-Market Road 149 and State Highway 105, west of the point where Farm-to-Market Road 149 crosses Town Creek in Montgomery County, Texas 77356.

NORTHEAST TEXAS COMMUNITY COLLEGE has applied for a renewal of TPDES Permit No. WQ0013948001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The facility is located at 2886 Farm-to-Market Road 1735, approximately 100 yards northwest of the campus entrance on Farm-to-Market Road 1735, approximately 3-1/2 miles southeast of the intersection of Farm-to-Market Road 1735 and State Highway 49 in the City of Mount Pleasant in Titus County, Texas 75455.

MONARCH UTILITIES I LP has applied for a renewal of TPDES Permit No. WQ0014056001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility is located approximately 0.75 mile northwest of the intersection of State Highway 190 and the Trinity River and approximately 2.5 miles northeast of the intersection of State Highway 190 and Farm-to-Market Road 980 in San Jacinto County, Texas 77364.

LOWER COLORADO RIVER AUTHORITY has applied for a renewal of TPDES Permit No. WQ0014404001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility is located approximately 2,700 feet east of Farm-to-Market Road 2031 (Beach Road) and approximately 1,200 feet north of the Gulf of Mexico in Matagorda County, Texas 77457.

CITY OF HOLLIDAY has applied for a renewal of TPDES Permit No. WQ0014674001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately one mile northeast of the center of the City of Holliday on the north extension of College Street, approximately 1/4 mile north of U.S. Highways 82 and 277 in Archer County, Texas 76366.

THE DALLAS COUNTY PARK CITIES MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0014699001, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 720,000 gallons per day. The facility is located approximately 1,500 feet northwest of the intersection of Harry Hines Boulevard and Burbank Drive (the easterly extension of Regal Row) in Dallas County, Texas 75235.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201005160
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 1, 2010

♦ ♦ ♦

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on August 24, 2010, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Tommy Davis dba Slick Machines Screening Plant; SOAH Docket No. 582-10-0469; TCEQ Docket No. 2009-0184-WQ-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Tommy Davis dba Slick Machines Screening Plant on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201005163
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 1, 2010

♦ ♦ ♦

Department of Family and Protective Services

Correction of Error

The Department of Family and Protective Services adopted new rules under 40 TAC Chapter 744, Minimum Standards for School-Age and Before or After-School Programs, in the August 20, 2010, issue of the *Texas Register* (35 TexReg 7469). Due to a Texas Register oversight, an error appears in the rule preamble on page 7489, second column, first paragraph. The last section number in the list was published as "744.382"; however, the correct number is "744.3821."

TRD-201005171

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General Land Office

Public Notice of Intent to Conduct Natural Resource Damage Assessment and Restoration Planning Pursuant to 15 CFR §990.44

AGENCIES: Texas General Land Office, Texas Parks and Wildlife Department, Texas Commission on Environmental Quality, and United States Fish and Wildlife Service

ACTION: Notice of Intent to Conduct a Natural Resource Damage Assessment and Restoration Planning process pursuant to the Oil Pollution Act of 1990 (OPA) for impacts to natural resources from the January 23, 2010 crude oil discharge into the Sabine-Neches Ship Channel, Jefferson County, Texas.

SUMMARY: Natural Resource Trustees are designated pursuant to OPA, 33 U.S.C. §2706(b), Executive Order 12777, and the National Contingency Plan, 40 CFR §300.600 and §300.605, with responsibility to conduct natural resource damage assessments on behalf of the public when discharges of oil affect natural resources and services. On January 23, 2010 the M/V Eagle Otome collided with the tow boat Dixie Vengeance in Port Arthur, Texas, discharging approximately 11,000 bbls (462,000 gallons) of Mexican sour crude oil into the Sabine-Neches Ship Channel (Incident). Approximately 16 miles of shoreline were impacted by the spill, as well as wildlife and wildlife habitat.

Natural Resource Trustees for the Incident are the Texas General Land Office, Texas Commission on Environmental Quality, Texas Parks and Wildlife Department, and the United States Department of the Interior represented by United States Fish and Wildlife Service. The Trustees have determined that the Incident warrants conducting a natural re-

source damage assessment (NRDA). This notice serves to inform the public that the Trustees are proceeding with an assessment and restoration planning, and will subsequently seek public input for planning restoration for the injuries resulting from the Incident. This assessment will be conducted in accordance with the NRDA regulations for oil spills at 15 CFR §§990.10 et seq.

ADDRESSES: A copy of this Notice of Intent and further information relating to the assessment and restoration planning may be obtained by contacting: Tommy Mobley, Texas General Land Office, Coastal Resources Division, Natural Resource Trustee Program, P.O. Box 12873, Austin, Texas 78711-2873; telephone: (512) 475-3401; e-mail: tommy.mobley@glo.state.tx.us.

SUPPLEMENTARY INFORMATION: In support of their decision to proceed with the assessment and issue this notice, the Trustees have made several determinations as required by 15 CFR §990.41. First, the Trustees have jurisdiction to pursue restoration pursuant to the Oil Pollution Act. The Trustees have determined that the Incident resulted in the discharge of approximately 11,000 bbls (462,000 gallons) of Mexican crude oil into or on navigable waters and shorelines of the United States and Texas that constituted an Incident as defined in 15 CFR §990.30. The discharge was from the M/V Eagle Otome. The Incident was not from a public vessel or from an offshore facility subject to the Trans-Alaska Pipeline Authority Act, 43 U.S.C. §§1651, et seq.

Using information gathered during pre-assessment activities, the Trustees have determined that natural resources under their trusteeship have been injured as a result of this Incident. The Trustees have conducted initial surveys of the areas where spill impacts were observed in order to document the areas oiled, the degree of oiling, and determine whether any impacts or mortality could be observed on either the flora or fauna of the area. The Trustees have made the further determination required by 15 CFR §990.42(a), that it is appropriate to proceed with restoration planning for this Incident. Restoration planning is necessary since injuries are likely to or have resulted from the Incident. The Trustees base this determination upon data that demonstrates that natural resources and services have been or were potentially injured. Natural resources or their services injured as a result of the spill and spill response may include, but are not limited to: shoreline habitat and waters of Sabine-Neches Ship Channel and connected sloughs; and biota, which may include benthic communities, fish, birds, and other wildlife species as well as recreational opportunities associated with these resources.

During the first 24 hours of the spill the Texas General Land Office and the U.S. Coast Guard responded to the spill and coordinated the initial deployment of spill response teams contracted through the M/V Eagle Otome vessel interests. Protection and collection strategies were deployed along and across the Sabine-Neches Ship Channel and adjacent sloughs leading into wetlands, as well as Keith Lake. Numerous vessels and skimming systems were deployed in conjunction with these measures (booms and snares) and shoreline clean-up activities, to collect the discharged oil. The response actions described have not, or are not expected to adequately address, the environmental and recreational injuries from the Incident, including interim losses. Thus, restoration planning is warranted.

The Trustees have further determined that restoration planning is appropriate since there are feasible primary and/or compensatory restoration actions available in or near the impacted area that could restore or compensate for injuries to natural resources. Restoration planning is also considered feasible since assessment procedures exist to evaluate the injuries and define the appropriate type and scale of restoration for the injured natural resources and services. The Trustees have determined that appropriate assessment procedures are available for this Incident and those procedures meet the applicable standards for such methods set forth in 15 CFR §990.27.

Representatives of the M/V Eagle Otome vessel interests have participated in the coordination of the spill response. The Texas General Land Office identified the M/V Eagle Otome, the operator of the vessel from which the oil was discharged, as the responsible party for the Incident, pursuant to Texas Natural Resource Code, §40.003(20)(A), through a State Letter of Interest dated May 25 2010. The U.S. Coast Guard also designated M/V Eagle Otome as the responsible party for the Incident, pursuant to 33 U.S.C. §2701(32) and §2702.

The Trustees have begun compiling applicable documents into an administrative record that explains the assessment and restoration decision-making process for this incident. Information regarding public access to this record or information regarding this notice may be obtained by contacting: Tommy Mobley, Texas General Land Office, Coastal Resources Division, Natural Resource Damage Assessment Program, P.O. Box 12873, Austin, Texas 78711-2873; telephone: (512) 475-3401; e-mail: tommy.mobley@glo.state.tx.us.

TRD-201005151
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: September 1, 2010

♦ ♦ ♦

Texas Health and Human Services Commission

Notice of Public Hearing

Medicaid Managed Care Stakeholder Forum of the Expansion of STAR+PLUS (Dallas Service Area)

September 21, 2010

2:00 p.m. to 5:00 p.m.

Meeting Site:

Texas Health Resources Corporate Office

Executive Conference Hall, 7th Floor

612 E. Lamar Blvd.

Arlington, TX 76011

Overview

The STAR+PLUS Medicaid program will be expanding into the Tarrant and Dallas service areas (SAs) effective February 1, 2011. HHSC will update stakeholders in these SAs on the current status of the STAR+PLUS expansion and answer questions about the program.

Contact: Diane Eberhart, Program Specialist-Managed Care Operations, (512) 491-1126, HHSC, 11209 Metric Blvd., Austin, diane.eberhart@hhsc.state.tx.us.

Special Instructions: The Executive Conference Hall is located on the 7th floor in the Tower Building on the corporate campus of Texas Health Resources. Parking is free on the campus.

This meeting is open to the public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who wish to attend the meeting and require auxiliary aids or services should contact Diane Eberhart at (512) 491-1126 at least 72 hours before the meeting so appropriate arrangements can be made.

TRD-201005067

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 26, 2010

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Notice of Public Hearing

Medicaid Managed Care Stakeholder Forum of the Expansion of STAR+PLUS (Tarrant Service Area)

September 21, 2010

9:00 a.m. to 12:00 p.m.

Meeting Site:

Texas Health Resources Corporate Office

Executive Conference Hall, 7th Floor

612 E. Lamar Blvd.

Arlington, TX 76011

Overview

The STAR+PLUS Medicaid program will be expanding into the Tarrant and Dallas service areas (SAs) effective February 1, 2011. HHSC will update stakeholders in these SAs on the current status of the STAR+PLUS expansion and answer questions about the program.

Contact: Diane Eberhart, Program Specialist-Managed Care Operations, (512) 491-1126, HHSC, 11209 Metric Blvd., Austin, diane.eberhart@hhsc.state.tx.us.

Special Instructions: The Executive Conference Hall is located on the 7th floor in the Tower Building on the corporate campus of Texas Health Resources. Parking is free on the campus.

This meeting is open to the public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who wish to attend the meeting and require auxiliary aids or services should contact Diane Eberhart at (512) 491-1126 at least 72 hours before the meeting so appropriate arrangements can be made.

TRD-201005066
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 26, 2010

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Public Hearing: Task Force for Children with Special Needs

The Task Force for Children with Special Needs (TFCSN) has set two (2) dates for Public Hearings that will take place:

Monday, September 13, 2010

4:00 p.m. to 7:00 p.m.

Winters Building

701 W. 51st St.

Public Hearing Room 125

Austin, TX 78751

and

Tuesday, September 14, 2010

8:30 a.m. to 10:30 a.m.

Brown-Heatly Building

4900 N. Lamar Blvd.

Public Hearing Room 1410

Austin, TX 78751

Consumers, Service Providers and other stakeholders with ideas or concerns about the accountability of established services and systems for children and youth with special needs are invited to give testimony on the topic to the Task Force for Children with Special Needs (TFCSN) in Austin, Texas.

The goal of the Task Force is to unite key decision-makers to create a strategic plan for the state to improve the coordination, quality and efficiency for the delivery of services for children with chronic illnesses, intellectual and/or developmental disabilities and/or mental illness.

The Task Force would like to learn more from the public about experiences receiving services for children and youth with special needs. For example, the Task Force would like to hear how it is to interact with schools, juvenile justice systems, and early childhood, Medicaid and mental health programs.

The meetings will focus on these seven questions:

1. Are the services focused on the child and the child's family?

2. Are the services easy to use?

3. Are the agencies that provide the services quick to respond to the client's needs?

4. Are the services of high quality?

5. Do the agencies use their funds wisely?

6. Do the services take into account the cultures of the people they serve?

7. Do the agencies have a specific way to watch and keep track of the success of their services?

People who cannot attend either meeting in person can send their comments or ideas in writing by:

(1) e-mail to opccy@hhsc.state.tx.us

-or-

(2) regular mail to:

Task Force for Children with Special Needs

Texas Health and Human Services Commission

P.O. Box 13247

Mail Code: BH1542

Austin, TX 78711

Contact: Kate Volti, Office of Program Coordination for Children and Youth, Health and Human Services Commission, 4900 N. Lamar Blvd., Austin, TX 78751, (512) 487-3497, kate.volti@hhsc.state.tx.us.

These meetings are open to the general public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who need auxiliary aids or services for this meeting are asked to call Cassandra Marx at (512) 424-6963 at least 72 hours before the meeting.

TRD-201004995

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 25, 2010

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective October 1, 2011.

The amendment modifies the current reimbursement methodology in the Texas Medicaid State Plan for Specialized Rehabilitation Services for Infants and Toddlers with Development Delays program by ending the Time and Financial Information (TAFI) system that is used to set reimbursement rates for providers of Specialized Rehabilitation Services effective October 1, 2010 replacing it with the Random Moment Time Study (RMTS) and a new cost report will be developed to collect cost. The proposed amendment has no fiscal impact.

Interested parties may obtain copies of the proposed amendment by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at dan.huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201005012
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: August 26, 2010

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Texas Department of Insurance

Company Licensing

Application to change the name of HORACE MANN LLOYDS to HML INSURANCE COMPANY, a domestic Lloyds. The home office is in Houston, Texas.

Application for admission to the State of Texas by SEECHANGE HEALTH INSURANCE COMPANY, INC., a foreign life, accident, and/or health company. The home office is in Columbus, Ohio.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201005154
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 1, 2010

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Notice of Opportunity to Witness a Presentation Regarding Workers' Compensation Loss Cost Filing by the National Council on Compensation Insurance

TO: Texas Employers, Manufacturers, Insurance Companies, Corporations, Exchanges, Mutuals, Reciprocals, Associations, Lloyds, or Other Insurers Writing Workers Compensation and Employers' Liability Insurance in the State of Texas, Their Agents and Representatives, and to the Public Generally

The National Council on Compensation Insurance (NCCI) made a Loss Cost filing for workers' compensation on August 12, 2010. NCCI made the filing in its capacity as an advisory organization and pursuant to provisions of the Texas Insurance Code.

On September 28, 2010, NCCI will make two (2) presentations regarding its Loss Cost filing. Interested persons can participate in the presentations on September 28, 2010 in one of two ways: in person in Room 100 of the William P. Hobby Building, 333 Guadalupe Street, Austin, Texas or via the telephone/Internet by accessing AT&T Web Meeting. There will be a presentation at 9:30 a.m. Central Standard Time and the same presentation again at 1:30 p.m. Central Standard Time. There is a maximum of 200 remote participants for each presentation.

Lori Lovgren and Ann Marie Smith from NCCI will make the presentations. For those who want to participate remotely, computer access to view the power point presentation will be provided through the Web Meeting Address of https://www.webmeeting.att.com and telephone access will be provided through the Meeting Telephone Number (877) 226-9790. The Access Code for both the computer and telephone for the web meeting is 9252502.

Participants by telephone/Internet or at the live presentation will have an opportunity to present questions about the filing and the presentation. Representatives of NCCI and TDI staff will be available for questions.

Copies of the NCCI Loss Cost Filing are available for review from the Property and Casualty Actuarial Division of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701 during regular business hours. For further information please contact Linda Turner by telephone at (512) 475-3017 or by email at pcactuarial@tdi.state.tx.us.

TRD-201005153
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 1, 2010

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Legislative Budget Board

Request for Qualifications

The Legislative Budget Board (LBB) issues this Request for Qualifications (RFQ) to pre-qualify vendors to assist the LBB in conducting a variety of performance reviews of Texas School and Community College Districts (Districts). Vendors may apply to be pre-qualified to provide expertise related to one or more of the functional areas listed in Section 3.2 of the RFQ.

Contact: The LBB is the Issuing Office and the sole point of contact for the RFQ. The RFQ is available on http://esbd.cpa.state.tx.us/ (click on View Newest Postings). Questions concerning the RFQ must be in writing and addressed to:

Legislative Budget Board

Fax: (512) 475-2902

E-mail: contract.manager@lbb.state.tx.us

Closing Date: Applications must be received in the issuing office at the address specified above no later than 5:00 p.m. CZT, on August 31, 2011. Proposals received after this time and date will not be consid-

ered. Respondents shall be solely responsible for confirming the timely receipt of proposals.

Evaluation and Award Procedure: The Team Manager with the assistance of the Contract Administrator will review all applications for compliance, experience, and thoroughness. All applications will be evaluated under the following criteria: **Knowledge of Functional Area and Review Process and Experience Related to Functional Area and Review Process.**

The LBB reserves the right to accept or reject any or all applications submitted. The LBB is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFQ. The LBB shall not pay for any costs incurred by any entity in responding to this Notice or the RFQ.

The anticipated schedule of events is as follows:

This is an "on-going" process of pre-qualifying applicants.

TRD-201005105
Bill Parr
Assistant Director
Legislative Budget Board
Filed: August 31, 2010

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North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Texas Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant request appeared in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4522). The selected consultant will perform technical and professional work to develop an Innovative Financial Plan for the Cotton Belt Passenger Rail Corridor.

The consultant selected for this project is Partnership for Livable Communities, LLC, 101 Summit Avenue, Suite 606, Fort Worth, Texas 76102. The amount of the contract is not to exceed $1,298,000.

TRD-201005083
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: August 27, 2010

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Texas Department of Public Safety

Hazard Mitigation Grant Program

As a result of Hurricane Alex, a major disaster (FEMA-1931-DR) was declared by the president on August 3, 2010. Due to this declaration, Texas is authorized federal funds through the Hazard Mitigation Grant Program (HMGP). This program is a 75/25 federal/local cost-share reimbursement grant program established by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, offered through the Federal Emergency Management Agency (FEMA), and administered by the State of Texas. The HMGP is a mitigation grant with a single mission to provide a means to:

(1) prevent or reduce future losses to lives and property through the identification and funding of cost-effective mitigation measures;

(2) minimize the costs of future disaster response and recovery.

The HMGP can fund mitigation measures that protect both public and private property, so long as the measures fit within the overall mitigation strategy for the disaster area, are cost-effective, and comply with all federal and state program guidelines.

All eligible applicants, which include local governments, state agencies, certain non-profit organizations and institutions, and Indian tribes or authorized tribal organizations are invited and encouraged to take advantage of this opportunity and apply for HMGP funds. These funds will be allocated to applicants based on a competitive application process.

If your organization is interested in participating in the HMGP process, you are invited to submit a notice of interest (NOI) to be postmarked by midnight on October 22, 2010 by mail, e-mail, or fax to the department.

Mailing address: Texas Hazard Mitigation Officer, Texas Department of Public Safety, Texas Division of Emergency Management, P.O. Box 4087, Austin, Texas 78773-0226.

E-mail addresses: hildy.soper@txdps.state.tx.us or marsha.rutherford@txdps.state.tx.us or wendy.kirby@txdps.state.tx.us.

Fax: (512) 424-5959.

The HMGP application deadline for this disaster is midnight on January 21, 2011. Detailed information including an HMGP fact sheet and the forms to use for development and submission of both a NOI and a complete HMGP application, are available on the Texas Department of Public Safety, Texas Division of Emergency Management website located at the following address: http://www.txdps.state.tx.us/dem/pages/downloadableforms.htm.

If you have questions or need assistance, please contact:

Mitigation Grants Officer Hildy Soper at (512) 424-2454, Blackberry (512) 284-1725 or by e-mail: hildy.soper@txdps.state.tx.us;

Mitigation Specialist Marsha Rutherford at (512) 424-5489 or by e-mail: marsha.rutherford@txdps.state.tx.us;

Mitigation Specialist Wendy Kirby at (512) 424-5478 or by e-mail: wendy.kirby@txdps.state.tx.us.

TRD-201005115
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Filed: August 31, 2010

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Mitigation Plan Update

Currently the Standard State Mitigation Plan is undergoing a formal review and update process in order to comply with the Code of Federal Regulations, Title 44, §201.4, which explains that States must have an approved Standard State Mitigation Plan meeting the requirements of this section as a condition of receiving non-emergency Stafford Act assistance and FEMA mitigation grants. For questions or comments, please contact Carolyn Sudduth at Carolyn.Sudduth@txdps.state.tx.us or call (512) 424-5683. The final draft will be posted on the Texas Department of Public Safety website for public comment, www.txdps.tx.us.

TRD-201005114
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Filed: August 31, 2010

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 26, 2010, for an amendment to a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act.

Project Title and Number: Application of Cebridge Acquisition, L.P. d/b/a Suddenlink Communications for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 38604 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include Montgomery, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 38604.

TRD-201005117
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Date Change - Public Notice of Workshop on Quarterly Wholesale Electronic Transaction Report and Request for Comments

The staff of the Public Utility Commission of Texas will hold a workshop regarding Quarterly Wholesale Electronic Transaction Reports, on Tuesday, September 28, 2010, at 9:30 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 35444, *Review of the Quarterly Wholesale Electronic Transaction Report (QWETR)* has been established for this proceeding. Since the report was originally designed for the Zonal Market, the QWETR will have to be updated for the nodal market. The points of delivery and receipt will have to align with the nodal market. This will require updating the Point of Delivery (POD), Point of Receipt (POR) field values while the Zonal fields will remain. This workshop is to discuss changes those changes.

Prior to the workshop, the commission request interested persons file comments to the following question:

* Apart from changes discussed above what other changes or improvements would you recommend in order to adapt this report to the Nodal Market environment?

Responses may be filed by submitting 5 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 10 days of the date of publication of this notice. All responses should reference Project Number 35444.

Five days prior to the workshop the commission shall make available in Central Records under Project Number 35444 an agenda for the format of the workshop.

The commission request that persons planning on attending the workshop register by phone or email with: Tony Grasso, Wholesale Market Division, (512) 936-7385, tony.grasso@puc.state.tx.us.

Questions concerning the workshop or this notice should be referred to Tony Grasso, Wholesale Market Division, (512) 936-7385, email, tony.grasso@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201005167
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 2010

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Notice of Application for Proceeding to Determine Whether to Modify the CREZ Transmission Plan

Notice is given to the public of a proceeding initiated by the Public Utility Commission of Texas on August 24, 2010 to determine whether to modify the competitive renewable energy transmission plan.

Docket Style and Number: PUC Proceeding to Determine Whether to Modify the CREZ Transmission Plan, Docket Number 38577.

The Application: On August 17, 2010, the Electric Reliability Council of Texas (ERCOT) responded to a request made by the Public Utility Commission of Texas (commission) regarding a re-evaluation of the need for the Gillespie to Newton transmission circuit included in Scenario 2 of the Competitive Renewable Energy Zones (CREZ) transmission optimization (CTO) study. At the August 19, 2010, open meeting the commission decided to establish a new docket to determine whether the commission should modify the CREZ transmission plan (CTP) approved by the commission in Docket Number 33672 and further clarified as to implementation and modification in Docket Numbers 37902 and 37928. The commission ordered that this docket shall be limited to determining whether the Gillespie-to-Newton transmission line is necessary or whether there are more cost-effective solutions than this specific line to accomplish the goals of the CTP in conformance with the Public Utility Regulatory Act §39.904(g)(2) and P.U.C. Substantive Rule 25.174(c).

ERCOT was ordered to file in this docket a summary and brief discussion of the re-evaluation of the need for the Gillespie-to-Newton CREZ transmission line and the analysis of the alternative solutions needed to limit curtailment of wind energy. ERCOT was ordered to file the study on or before September 23, 2010.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. The deadline for intervention/comment in this proceeding is October 7, 2010. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 38577.

TRD-201005065
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 2010

♦ ♦ ♦

Notice of Application for Retail Electric Provider Certification

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 25, 2010, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of RetailOPCO of Texas, Inc., Pursuant to Substantive Rule §25.107, Docket Number 38603 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 17, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38603.

TRD-201005121
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of a joint application for sale, transfer, or merger filed with the Public Utility Commission of Texas on August 26, 2010, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.101 and §37.154 (Vernon 2007 & Supp. 2009).

Docket Style and Number: Application of LCRA Transmission Services Corporation for Sale, Transfer, or Merger of Certain Substation Assets to the City of Burnet, Docket Number 38608.

The Application: LCRA Transmission Services Corporation (LCRA TSC) filed an application for approval to transfer from LCRA TSC to the City of Burnet, specific substation equipment, including four distribution, vacuum circuit breakers and associated control panels and wiring within the LCRA TSC-owned Burnet Substation. LCRA TSC stated that this matter does not involve certificated facilities or service areas and that there are no customer connections affected by this application.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 38608.

TRD-201005119
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 25, 2010, for an amendment to certificated service area for a service area exception within Galveston County, Texas.

Docket Style and Number: Application of CenterPoint Energy Houston Electric, LLC to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Galveston County. Docket Number 38600.

The Application: CenterPoint Energy Houston Electric, LLC (CenterPoint Energy) filed an application for a service area boundary exception to allow CenterPoint Energy to provide service to a specific customer located within the certificated service area of Texas-New Mexico Power Company (TNMP). TNMP has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than September 17, 2010 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 38600.

TRD-201005116
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 26, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act.

Docket Title and Number: Application of Joe's Really Fast Internet for a Service Provider Certificate of Operating Authority, Docket Number 38605.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant's requested SPCOA geographic area includes the Dallas LATA exchanges currently served by Southwestern Bell Telephone Company, LP d/b/a AT&T Texas and GTE Southwest, Inc. d/b/a Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 17, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38605.

TRD-201005122
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 26, 2010, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of 20 thousand-blocks of numbers in the El Paso rate center.

Docket Title and Number: Petition of AT&T Texas for Waiver of Denial of Numbering Resources for El Paso Rate Center, Docket Number 38607.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 16, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38607.

TRD-201005118
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 26, 2010, for waiver of denial by the Pooling Administrator (PA) of Grande Communications Networks, LLC's (Grande) request for assignment of one thousand-block of numbers on behalf of its customer, Providence Healthcare Network, in the Waco rate center.

Docket Title and Number: Petition of Grande Communications Networks, LLC for Waiver of Denial of Numbering Resources for Waco Rate Center, Docket Number 38609.

The Application: Grande Communications Networks, LLC submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Grande Communications Networks, LLC did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 16, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38609.

TRD-201005120
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 31, 2010

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Notice of Application under Public Utility Regulatory Act §39.158

Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 23, 2010, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.158 (Vernon 2007 & Supp. 2009) (PURA).

Docket Style and Number: Application of NRG South Central Generating LLC (NRG South) Pursuant to §39.158 of the Public Utility Regulatory Act, Docket Number 38591.

The Application: NRG South Central Generating LLC (Applicant) has filed an application for approval of the proposed purchase by Applicant of 100% of the ownership interests in Cottonwood Development LLC (Transaction). Cottonwood Development LLC indirectly owns the Cottonwood Energy Generating Facility, a 1,233.6 MW combined cycle generating plant located in Deweyville, Texas (Cottonwood Facility) within the SERC power region. As a result of the proposed Transaction, Cottonwood Development LLC will become a wholly-owned, direct subsidiary of NRG. The Applicant is required to obtain commission approval before closing the Transaction if the electricity to be offered for sale in a power region will exceed one percent of the total electricity for sale in the power region if the Application is approved. The commission shall approve the Application unless the commission finds that it results in a violation of §39.154 of PURA. Under §39.154, upon the introduction of customer choice, a power generation company may not own and control more than 20% of the installed generation capacity located in, or capable of delivering electricity to a power region in Texas.

Cottonwood Development LLC owns no other generation facilities in Texas. The combined, direct and indirectly owned generation owned and controlled by NRG following the acquisition of Cottonwood Development LLC may exceed 1% of the installed generation capacity in SERC. However, Applicant has stated that the Transaction will not result in a violation of the installed capacity share limitations set forth in PURA §39.154, which is the sole issue in this proceeding.

Persons who wish to intervene in the proceeding or comment upon action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) at 1-800-735-2989. All correspondence should refer to Docket Number 38591. The deadline for intervention in the proceeding will be Thursday, October 7, 2010, unless otherwise ordered by the presiding officer, and you must send a letter requesting intervention to the commission, which must be received by that deadline.

TRD-201005169
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 2010

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Public Notice of Open Meeting/Hearing Regarding Recovery by Electric Utilities of Distribution Costs

The staff of the Public Utility Commission of Texas (commission) will hold an open meeting/hearing regarding recovery by electric utilities of distribution costs, on Friday, October 8, 2010 at 9:30 a.m. to 12:30 p.m. in Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 38298, *Rulemaking Related to Recovery*

by Electric Utilities of Distribution Costs has been established for this proceeding.

Questions concerning the hearing or this notice should be referred to Darryl Tietjen, Director, Rate Regulation, (512) 936-7436. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201005168
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 2010

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Railroad Commission of Texas

Correction of Error

The Railroad Commission of Texas adopted 16 TAC §3.30, relating to Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ), in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7728). Due to an agency omission, the words "or to the" were dropped from the text of the second sentence in §3.30(e)(1)(A). The corrected text of §3.30(e)(1)(A) reads as follows: "(A) The TCEQ and the RRC encourage generators to eliminate pollution at the source and recycle whenever possible to avoid disposal of solid wastes. Questions regarding source reduction and recycling may be directed to the TCEQ Small Business and Environmental Assistance (SBEA) Division, or to the RRC...."

TRD-201005165

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Texas Department of Transportation

Aviation Division - Request for Proposal for Professional Engineering Services

Jackson County, through its agent, the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Jackson County Airport during the course of the next five years through multiple grants.

Current Project: Jackson County. TxDOT CSJ No.: 1113EDDNA. Scope: Reconstruct apron, rehabilitate hangar access taxiway, parallel and cross taxiways, rehabilitate and mark Runway 14-32 at the Jackson County Airport.

The DBE goal for the current project is 4%. TxDOT Project Manager is Harry Lorton.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Rehabilitate/repair auto parking area

2. Apron expansion

Jackson County reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Jackson County Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 4, 2010 at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Harry Lorton, Project Manager.

TRD-201005106
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: August 31, 2010

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Aviation Division - Request for Proposal for Professional Engineering Services

Gillespie County, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254,

Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at Gillespie County Airport during the course of the next five years through multiple grants.

Current Project: Gillespie County. TxDOT CSJ No.: 1114FRBRG. Scope: Rehabilitate and mark Runway 14-32, Taxiway B and C; rehabilitate terminal apron, hangar access taxiways, north apron and parallel taxiway; relocate and upgrade AWOS to south end for apron expansion; install game proof fence; replace MIRLS Runway 14-32 and construct helicopter parking ramp at the Gillespie County Airport.

The HUB goal for the current project is 6%. TxDOT Project Manager is Harry Lorton.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Expand ramp

2. Construction of apron around Snowden Hangar

Gillespie County reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Gillespie County Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 4, 2010 at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager or technical questions, please contact Harry Lorton, Project Manager.

TRD-201005107
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: August 31, 2010

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Aviation Division - Request for Proposal for Professional Engineering Services

Stephens County, through its agent, the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Stephens County Airport during the course of the next five years through multiple grants.

Current Project: Stephens County. TxDOT CSJ No.: 1123BRKRG. Scope: Rehabilitate Taxiway A, B, C, D, E, public apron, apron #2 and apron #3; rehabilitate and mark Taxiway F, Runway 13-31, Runway 17-35 and Taxiway A 3-stubs; construct concrete fueling apron; overlay Taxiway A; upgrade PAPIs Runway 17-35 and replace rotating beacon and tower at the Stephens County Airport.

The DBE goal for the current project is 6%. TxDOT Project Manager is Clayton Bridwell.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Expand auto apron

2. Upgrade signage

3. Update Airport Layout Plan

4. Install MIRL Runway 13-31

Stephens County reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Stephens County Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may

be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 4, 2010 at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Clayton Bridwell, Project Manager.

TRD-201005108
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: August 31, 2010

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Aviation Division - Request for Proposal for Professional Engineering Services

The City of Smithville, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Smithville Municipal Airport during the course of the next five years through multiple grants.

Current Project: City of Smithville. TxDOT CSJ No.: 1114SMITH. Rehabilitate apron, mark and rehabilitate RW 17-35, rehabilitate stub TW, rehabilitate turnaround RW 35 end and rehabilitate and mark partial parallel TW to RW 17.

The HUB goal for the current project is 9%. TxDOT Project Manager is Paul Slusser.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Pave access road and auto parking
2. Install signage
3. Construct and mark TW to RW 35 end
4. Airport Development Plan
5. Construct hangar access taxiways

The City of Smithville reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Smithville Municipal Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 5, 2010, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Kelle Chancey.

The consultant selection committee will be composed of Aviation Division staff members and one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee

deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Kelle Chancey, Grant Manager. For technical questions, please contact Paul Slusser, Project Manager.

TRD-201005109
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: August 31, 2010

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Notification of Industry Review Period - Draft Specification for Toll Operations and Customer Service Center Operators

Pursuant to Texas Transportation Code, §228.052, the Texas Department of Transportation (department) may enter into an agreement with one or more persons to provide personnel, equipment, systems, facilities, and services necessary to operate a toll project or system, including the operation of toll plazas and lanes and customer service centers and the collection of tolls. The Texas Transportation Commission has promulgated rules located at 43 Texas Administrative Code §27.83 governing the requirements for soliciting proposals to operate a department toll project or system. Through this notice, the department is exploring options for procuring services from a prime vendor with high quality systems to support the operation of the customer service center and toll plazas for current and future toll facilities in Texas. This draft specification is intended to elicit discussions between the department and the vendor community. Interested parties will review the contents of the draft specification for Toll Operations and Customer Service Center Operators. After review, interested parties will submit a Letter of Interest (LOI) in order to participate in an individual pre-proposal conference with the department. Submission of an LOI and participation in a pre-proposal conference is optional and is not a prerequisite to responding to the formal Request for Proposal (RFP). However, participation in a pre-proposal conference may provide the vendor opportunities, in a relatively informal forum, to discuss the procurement process and their specific approach with department officials.

Letters of Interest will be accepted until 3:00 p.m. CST, on Friday, September 24, 2010. Upon receipt of the LOI, the department will contact interested vendors to schedule the pre-proposal conference. These meetings will be scheduled to begin on October 4, 2010.

The department is providing this material to allow time for establishing teams and organizing an approach to the project in advance of responding to the formal RFP. A formal RFP will be issued following the conclusion of the pre-proposal conferences. The department anticipates that the formal RFP will be issued on or about October 22, 2010.

The industry review draft specification and details for submitting an LOI will be available on the following website: http://www.txdot.gov/business/projects/toll_ops.htm or by contacting Ms. Kathy Garrett, Texas Department of Transportation, Turnpike Authority Division, 4616 Howard Lane Suite 850, Austin, Texas 78728; telephone: (512) 874-9723; email: Kathy.Garrett@txdot.gov.

The department has operated toll roads in Texas since 2006. Additional information regarding facility background and descriptions can be researched at http://www.texastollways.com.

TRD-201005149
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 1, 2010

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The Texas A&M University System

Award of a Major Consulting Contract

In accordance with the provisions of Texas Government Code, Chapter 2254, The Texas Forest has entered into a consulting contract for an enterprise GIS Implementation plan and system design. The consultant will provide a formal planning process to develop an implementation plan and system design that can be integrated through an entire organization so that a large number of users can manage and share spatial data information.

The Name and Address of Consultant is as follows: Data Transfer Solutions, Inc., 3680 Avalon Park Boulevard, Suite 200, Orlando, Florida 32828.

The Texas Forest Service will pay an amount of $147,000. The contract will begin on August 24, 2010 and shall terminate on February 28, 2011 unless renewed for additional months up to April 30, 2011.

If any, the consultant will submit documents, films, recordings, or reports compiled by the consultant under the contract to the Texas Forest Service, no later than three months after completion of services.

Any questions regarding this posting should be directed to: Alan Degelman, Purchasing Department Head/HUB Coordinator, Purchasing Department, John B. Connally Building, 301 Tarrow Street, Suite 419, College Station, Texas 77840.

TRD-201005103
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: August 30, 2010

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University of North Texas

Notice of Intent to Renew and Extend Consulting Contract

Pursuant to the provisions of Texas Government Code, Chapter 2254, the University of North Texas (UNT) intends to renew and extend a contract for consulting services related to the accreditation of a joint Pharm D program. The consulting services are currently being provided by Dr. Roslie Sagraves under a contract signed on October 23, 2009.

As required by Chapter 2254 of the Texas Government Code, prior to renewing and extending its contract with Dr. Sagraves, UNT is posting this Notice of Intent to Amend Consulting Contract, and hereby extends this invitation to qualified and experienced consultants interested in providing the consulting services described in this notice.

Scope of Work:

The consulting firm will be responsible for assisting UNT in evaluating, assessing and recommending of the pathway to accreditation of a joint PharmD program at UNT. The consultant must be or must have been a dean in a School of Pharmacy in a research university with experience necessary to provide the pathway to the accreditation of a joint PharmD program. The consultant must be able to provide a timeline and budget and be able to evaluate the following: (1) Faculty expertise needed and administrative needs; (2) Space requirements, including laboratory

space; (3) Library resources needed; (4) Potential funding for research in pharmacy; (5) Assessment of pre-pharmacy programs and expectations for entering students; (6) Clinical placement of opportunities in Denton and Dallas for students; (7) Clinical appointments for faculty in hospitals or elsewhere; (8) Initial costs as well as ongoing costs; (9) Potential of partnerships with HSC; (10) Size of classes to achieve maximum benefit.

Specifications:

Any consultant submitting an offer in response to this Invitation must provide the following: (1) the consultant's legal name, including type of entity (individual, partnership, corporation, etc.) and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the hourly rate to be charged for each team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to providing the services described in the Scope of Work section of this Invitation, any unique benefits the consultant offers UNT, and any other information the consultant desires UNT to consider in connection with the consultant's offer; (8) information to assist UNT in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this Invitation; (9) information to assist UNT in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education; (10) information to assist UNT in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist UNT in assessing the overall cost to UNT for the requested services to be performed; and (12) information to assist UNT in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services sought herein do relate to services previously provided to UNT by Dr. Rosalie Sagraves. UNT intends to renew and extend the contract for the consulting services to Dr. Rosalie Sagraves unless a better offer, as determined by UNT, in its sole discretion, is received in response to this invitation.

Selection of the Successful Offer (defined below) submitted in response to this Invitation by the Submittal Deadline (defined below) will be made using the competitive process described below. After the opening of the offers and upon completion of the initial review and evaluation of the offers submitted, selected consultants may be invited to participate in oral presentations. The selection of the Successful Offer may be made by UNT on the basis of the offers initially submitted, without discussion, clarification or modification. In the alternative, selection of the Successful Offer may be made by UNT on the basis of negotiation with any of the consultants. At UNT's sole option and discretion, it may discuss and negotiate all elements of the offers submitted by selected consultants within a specified competitive range. For purposes of negotiation, a competitive range of acceptable or potentially acceptable offers may be established comprising the highest rated offers. UNT will provide each consultant within the competitive range with an equal opportunity for discussion and revision of its offer. UNT will not disclose any information derived from the offers submitted by competing consultants in conducting such discussions. Further action on offers not included within the competitive range will be deferred pending the selection of the Successful Offer, however UNT reserves the right to include additional offers in the competitive range if deemed to be in its best interest. After the submission of offers but before final selection of the Successful Offer is made, UNT may permit a consultant to revise its offer in order to obtain the consultant's best final offer. UNT is not bound to accept the lowest priced offer if that offer is not in its best interest, as determined by UNT. UNT reserves the right to: (a) enter into agreements or other contractual arrangements for all or any portion of the Scope of Work set forth in this Invitation with one or more consultants; (b) reject any and all offers and re-solicit offers; or (c) reject any and all offers and temporarily or permanently abandon this procurement, if deemed to be in the best interest of UNT.

Criteria for Selection:

The successful offer (Successful Offer) must be submitted in response to this Invitation by the Submittal Deadline will be the offer that is the most advantageous to UNT in UNT's sole discretion. Offers will be evaluated by University of North Texas and member institution personnel. The evaluation of offers and the selection of the Successful Offer will be based on the information provided to UNT by the consultant in response to the Specifications section of this Invitation. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to UNT. The successful consultant will be required to enter into a contract acceptable to UNT.

Consultant's Acceptance of Process:

Submission of an offer by a consultant indicates: (1) the consultant's acceptance of the Selection Process, the Criteria for Selection, and all other requirements and specifications set forth in this Invitation; and (2) the consultant's recognition that some subjective judgments must be made by UNT during this Invitation process.

Finding by President:

The President of the University of North Texas finds that the consulting services are necessary because the University of North Texas does not have the specialized experience or the staff resources to achieve these objectives. The University of North Texas believes that such expert consulting services will be cost effective, as they will ensure that the evaluation, assessment and recommendations of the accreditation for a School of Pharmacy are thoughtfully set forth in an efficient and effective manner from inception.

Submittal Deadline:

To respond to this Invitation, the response to the invitation should be in clear and concise written format and sent to: Carrie Stoeckert, Assistant Director, University of North Texas, 2310 North Interstate 35-E, Denton, Texas 76205. Offers must be submitted in an envelope or other appropriate container and the name and return address of the consultant must be clearly visible. All offers must be received at the above address no later than 3:00 p.m., CST, Thursday, October 7, 2010 (Submittal Deadline). Submissions received after the Submittal Deadline will not be considered.

Questions:

Questions concerning this Invitation should be directed to: Carrie Stoeckert, Assistant Director, at carries@unt.edu. UNT may in its sole discretion respond in writing to questions concerning this Invitation. Only UNT's responses made by formal written addenda to this Invitation shall be binding. Oral or other written interpretations or clarifications shall be without legal effect.

TRD-201005166
Carrie Stoeckert
Assistant Director, Bids and Contracts
University of North Texas
Filed: September 1, 2010

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Workforce Solutions Capital Area

Legal Request for Qualifications Reissue

The Workforce Solutions Capital Area Workforce Board ("Board" or "WFSCA") is soliciting proposals from qualified individuals or firms to provide professional legal services.

The Request for Qualifications (RFQ) is available beginning Monday, August 30, 10:00 a.m. (CST). Copies of the RFQ are available at the Board office located at 6505 Airport Blvd., Suite 101E, Austin, TX 78752, during normal business hours (Monday - Friday, 8:00 a.m. to 5:00 p.m.) except for holidays. A copy of the RFQ may also be requested via e-mail by sending a request to alan.miller@twc.state.tx.us with the following information: name of organization, contact person, completed physical address, phone and fax numbers, and e-mail address. You may also download the RFQ from our website www.wfscapitalarea.com.

Proposals must be received by Workforce Solutions Capital Area no later than 12:00 p.m. (noon, CST) on September 24, 2010. After this RFQ is issued, written questions may be submitted by mail, e-mail or fax and must be addressed to: Alan Miller, Workforce Solutions, Capital Area Workforce Board, 6505 Airport Blvd., Suite 101E, Austin, TX 78752. Fax (512) 719-4710, e-mail: alan.miller@twc.state.tx.us.

TRD-201005016
Niki Sanders
Executive Assistant/HR
Workforce Solutions Capital Area
Filed: August 26, 2010

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*